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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 516

J. T. ROBERTS, APPELLANT,

vs.

RICHLAND IRRIGATION DISTRICT ET AL., ETC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED NOVEMBER 19, 1932

(37,213)

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INDEX

	Original	Print
Record from superior court of Benton County	1	1
Complaint	1	1
Restraining order and order to show cause	13	11
Bond on restraining order (omitted in printing)	15	
Stipulation as to hearing (" " ")	17	
Order as to hearing (" " ")	19	
Stipulation as to agreed order	21	12
Order modifying restraining order	25	13
Stipulation as to intervention	27	14
Order permitting intervention of J. T. S. Lyle et al	28	15
Demurrer of intervenors	29	15
Demurrer of defendants Richland Irrigation District et al	30	16
Demurrer of defendants Ira C. Hawley et al	31	17
Opinion, Driscoll, J	32	18
Judgment	33	18
Notice of appeal	35	20
Order fixing amount of bond	37	21
Bond on appeal (omitted in printing)	38	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 23, 1932

	Original	Print
Proceedings in supreme court of Washington	40	21
Excerpts from appellant's reply brief	40	21
Order for hearing en banc	41	22
Opinion, Millard, J.	42	22
Petition for rehearing (omitted in printing)	48	
Order denying rehearing	66	29
Judgment	67	30
Petition for appeal, assignments of error, and prayer for reversal	68	30
Affidavits of service	71	32
Order allowing appeal	77	35
Affidavits of service	79	36
Certificate of chief justice re finality of judgment	85	39
Certificate of chief justice re consideration of Federal constitutional question	87	40
Bond on appeal (omitted in printing)	121	
Order approving bond (" " ")	123	
Affidavits of service (" " ")	124	
Citation and service (" " ")	130	
Præcipe for transcript of record	132	42
Excerpts from briefs	136	45
Præcipe for additional transcript of record	139	48
Clerk's certificate (omitted in printing)	152	
Statement of points to be relied upon and designation of parts of record to be printed	154	49
Designation of additional parts of record to be printed	159	53

[fols. a-1]

IN SUPERIOR COURT OF BENTON COUNTY

No. 5607

J. T. Roberts, a Widower, Plaintiff,

v.

Richland Irrigation District, an Irrigation District; C. J. Barnett, W. A. Stockman, and W. C. McInnis, Directors of the Richland Irrigation District, an Irrigation District, and Harry Forsyth, Treasurer of Benton County, Washington; B. J. Pacius, Ira C. Hawley, and H. S. Hughes, County Commissioners of Benton County, Washington, Defendants

Complaint—Filed Jan. 12, 1931

Comes now the plaintiff herein and for cause of action against the defendants alleges:

I

That this plaintiff is and at all times herein referred to has been a resident of Benton County, State of Washington.

That Richland Irrigation District is an irrigation district, organized and existing under the irrigation district laws of the state of Washington, having its office and principal place of business at Richland, Washington; that C. J. Barnett, W. A. Stockman and W. C. McInnis, are the duly elected, qualified and acting board of directors of Richland Irrigation District; that Harry Forsyth is the duly elected, qualified and acting County Treasurer of Benton County; that B. J. Pacius and Ira C. Hawley and H. S. Hughes are the duly elected, qualified and acting County Commissioners of Benton County, Washington.

II

That on and prior to the first day of January, 1919, this [fol. 2] plaintiff was and at all times since has been and now is the owner of a certain tract of land situate in Benton County, State of Washington, more particularly described as follows, to-wit:

The Northwest Quarter of the Northwest Quarter (N. W. ¼ N. W. ¼) of Section Four (4), Township Nine (9), North Range Twenty-eight (28) East of the Willamette Meridian,

which land was, prior to the first day of January, 1919, occupied by this plaintiff and cultivated as a farm. That said real property was valuable for agricultural purposes, being an irrigated tract; that there was and is now appurtenant to it a valuable water right.

III

That on the 7th day of January, 1919, there was filed in the office of the County Commissioners of Benton County, Washington, a certain petition signed by the owners of land in said county, contiguous to or in the neighborhood of the real property owned by this plaintiff, praying for the formation of an irrigation district, to be known as Richland Irrigation District, and thereafter such steps were taken by said petitioners and by other persons that said district was organized by an order entered by the county commissioners of Benton County, on the 17th day of March, 1919, constituting and creating said Richland Irrigation District, and defining and fixing the territorial boundaries of said district, and that a copy of said order was filed in the office of the Auditor of said county on the 17th day of March, 1919. That in pursuance of the action of the board of County Commissioners, certain proceedings were had in the Superior Court for Benton County, State of Washington, and on February 25, 1930, a decree of confirmation was signed by the judge of said court confirming the organization and establishment of the Richland Irrigation District.

[fol. 3] IV

That the real property hereinabove described belonging to the plaintiff was included within the territorial limits of said irrigation district, despite the fact that this plaintiff did not join in said petition, and this plaintiff at all times did, by all appropriate means, object to the formation of said district, and to the inclusion of his lands within the territorial limits thereof.

That thereafter the board of directors of said irrigation district over the protest and without the consent of this plaintiff undertook to acquire, develop and improve certain ditches, flumes, water rights, canals, machinery, tools and appliances for the purpose of improving the existing facilities for irrigating the lands within said district, or creating new facilities therefor, and to issue the bonds of said district in payment therefor.

V

That said projected improvements, betterments and developments contemplated an expenditure in the sum of approximately $538,000; that for the purpose of meeting and providing for said expenditure, the board of directors called an election for the purpose of determining whether or not bonds of said district should be issued to pay the cost thereof; that in pursuance of the action of the board of directors, an election was held and a majority of the votes cast were in favor of the issuance of bonds to pay the cost of said improvements, and that by said special election, the board of directors were authorized to issue bonds in the sum of $590,000; that prior to and at said election the plaintiff herein objected to the authorization and issuance of said bonds.

[fol. 4]

VI

That pursuant to the authority of said election, the Richland Irrigation District did, on or about the first of July, 1920, issue and sell its bonds in the principal sum of $538,000, in the form prescribed by the laws of the State of Washington, bearing interest at the rate of 6 per cent per annum, payable semi-annually, and that said bonds and the proceeds thereof were used for the purpose of acquiring additional water rights and improving irrigation works and facilities serving the lands of this plaintiff and other lands within the district.

VII

That prior to the purchase of the additional water rights and the making of the improvements hereinabove referred to by said irrigation district, the real property with the appurtenant water rights and facilities, belonging to this plaintiff, hereinabove described, was of the reasonable

market value of $3,500. That immediately subsequent to the acquisition of said additional water rights and the making of said improvements and betterments by said irrigation district, and by reason thereof the value of said real *real* property and the water rights appurtenant thereto was increased in the sum of $350, or approximately $10 per acre of the irrigable portion of the above tract, making the total reasonable market value of said property immediately after the acquiring of said additional water rights, and the making of said improvements, in the sum of $3,850.00.

VIII

That no other benefits of any description accrued to this plaintiff or to the lands owned by him by reason of the acquirement of said additional water rights, the making of said improvements, or the expenditure of any funds by said district, in excess of the sum of $350.

[fol. 5]

IX

That by reason of the increase in the value of the land and water rights appurtenant thereto, by reason of betterments and improvements made by the district from the funds derived from the sale of the $538,000 bonds above referred to, benefits accrued to the above-described land in the sum of $350, and no more, and said real property thereby became liable to an assessment for the payment of said bonds in the sum of $350 and no more, with interest at 6 per cent on deferred principal assessments until paid. That said amount was collectible by the district, by means of assessments levied for the bond interest and retirement fund.

X

That the bonds issued for the purpose of meeting the expenses of acquiring additional water and improving existing facilities bore interest at the rate of 6 per cent per annum and matured in the following amounts in the respective years herein set forth:

Series	Amount	Date due
A	$29,500	July 1, 1931
B	35,400	July 1, 1932
C	41,300	July 1, 1933
D	47,200	July 1, 1934
E	51,100	July 1, 1935
F	57,000	July 1, 1936
G	62,900	July 1, 1937
H	58,200	July 1, 1938
I	61,000	July 1, 1939
J	94,400	July 1, 1940
	$538,000	

XI

That by reason of the fact that plaintiff's land was benefited in the sum of $350, and that by reason of the fact that bonds bearing interest at the rate of 6 per cent per annum, and retirable in accordance with the table above set forth, were issued to pay the costs of benefits, the plaintiff's land [fol. 6] was liable to assessment for said bonds in the sum of $350 plus interest at the rate of 6 per cent per annum for a period of ten years, plus interest at the rate of 6 per cent per annum on the unpaid balance of the plaintiff's liability during the period that the bonds matured. That the ultimate amount of the liability of the plaintiff's land for assessment for the bonds issued by the Richland Irrigation District was the sum of $560.00.

XII

That between the years 1920 and 1929, inclusive, the board of directors of the Richland Irrigation District, for the purpose of providing funds for the payment of interest and principal on the bonded indebtedness of the Richland Irrigation District, levied against this plaintiff's land, the following amounts for the respective years named:

1920	$60.40
1921	70.35
1922	93.80
1923	149.10
1924	144.90
1925	150.00

1926	150.00
1927	75.60
1928	183.00
1929	91.50

That plaintiff, for the purpose of protecting his title, and under threat of losing it, paid said assessments in full. That plaintiff's payments on assessments for interest and principal on the bonds referred to above aggregate the sum of $1,168.65 over the years named. That the plaintiff's payments have exceeded the amount for which his land is legally assessable for said bond interest and retirement, and that plaintiff's land and the water rights appurtenant thereto are no longer liable for assessment for that purpose.

XIII

That the board of directors of the Richland Irrigation District have made all preparations for and threaten to levy an assessment against the lands of the plaintiff here- [fol. 7] inabove described for the year 1931 in the sum of $757.53, and to cause a public record to be made of said assessment, thereby creating an apparent lien of record in said amount, upon the lands of the plaintiff hereinabove referred to. That the threatened levy of $757.53 is to be made upon a fundamentally wrong and illegal theory and basis, in this: That no part of said levy is made on account of or with reference to any special benefit accruing to the real property of the plaintiff hereinabove referred to. That said assessment has been levied for the purpose of creating a fund to take up or eliminate the deficiencies in the bond interest and bond retirement funds of said irrigation district, due wholly or in part to a failure of certain landowners within the district to pay assessments which have heretofore or will hereafter be levied against lands in said district belonging to such other persons.

That said directors of the Richland Irrigation District have stated to this plaintiff that it is their fixed policy and that they propose to assess and re-assess all delinquencies which have heretofore or may hereafter accrue against the lands of this plaintiff and other lands in the district which continue to pay their assessments, without delinquency, until the lands of this plaintiff, and the lands of other persons who have and who shall hereafter pay the assess-

ments levied, will create a fund sufficient to pay the entire outstanding indebtedness, and retire said bonds, both principal and interest, and that they propose to make such assessments without reference to the special benefits which have accrued to the real property of this plaintiff and any other landowners in the district who may continue to pay their assessments, but to be governed and determined in making said assessments solely by a consideration of the amount of money required to pay said indebtedness, principal and interest.

[fol. 8]

XIV

That the threatened assessment against lands of this plaintiff and all other persons similarly situated is equal to or greater than the gross income derived from the produce of this land and other respective tracts of land, and that it is in substantial excess of the net income derived therefrom. That the threatened assessment is equal to or in excess of one third the reasonable market value of said property and that further assessments on the same basis and theory for the year 1932 will exceed the total value of said property.

XV

The question of the rights of the plaintiff in this matter is one of common or general interest to many persons and this action is brought on behalf of the plaintiff himself and others similarly situated.

XVI

That in the event of the failure of this plaintiff and others similarly situated to pay said assessments, said directors threaten to foreclose said assessments and deprive him and them of title and ownership to said real property. That an assessment levied for the purpose and in the manner hereinabove described is illegal and void, based upon a fundamentally wrong theory and plan, and will result in creating an apparent lien of record against the real property herein described, constituting a cloud upon the title of this plaintiff, and that by reason of the threat to assess and re-assess all delinquencies now existing or which may hereafter accrue against said property in successive years, said real property is and will be de-

prived of all marketability and be made absolutely valueless; that the making of such an assessment and placing it of record will create a cloud upon the title of every landowner within said irrigation district, which can be removed only by the maintenance of individual suits to cancel said [fol. 9] assessments as to each tract of land resulting in a multiplicity of suits, which many of the residents of said district, because of want of funds, are unable to maintain. That the action of the board in imposing illegal assessments in the manner hereinabove described and in threatening to continue to levy all accrued and accruing delinquencies through the successive future years as herein stated, constitutes a confiscation of the lands of this plaintiff and the owners of other lands in said district similarly situated, depriving them of their property without compensation and without due process of law, and denying them the equal protection of the law. That if the defendants herein are not restrained from making such illegal and confiscatory levy, the plaintiff and others similarly situated will suffer irreparable damage.

XVII

That in the event the defendants herein levy said assessment, and spread it upon the records of Benton County, thereby creating an apparent lien against each piece of real property within the limits of said irrigation district, and said action is ultimately determined by this court to be illegal and void, it will be impossible to correct said record and to remove the apparent cloud on the titles to the real property in said district save by the maintenance of an individual suit to quiet title as to each of said properties; that no power resides in said board of directors of the Richland Irrigation District, or of the board of county commissioners of Benton County, or in the Treasurer of Benton County, to correct or rectify said record. That many persons within said district are without the funds or means of protecting themselves by instituting and maintaining such suits. That the board of directors are planning and threatening to place said assessment against the lands within one or two days from the date hereof, and that unless an order is immediately issued restraining their [fol. 10] action, the plaintiff herein and other persons similarly situated will suffer irreparable damage, and that

an emergency exists calling for the exercise by this court of its equitable powers in issuing an appropriate restraining order and injunction against said defendants and each of them, until such time as the matter can be presented and heard upon the merits.

XVIII

That plaintiff has no adequate, plain or speedy remedy at law.

Wherefore the plaintiff prays that the court enter its judgment decreeing:

1. That the plaintiff's land and water rights were benefitted in the sum of $350 by the improvements hereinabove referred to.

2. That the plaintiff has heretofore paid to the Richland Irrigation District all sums for which said land is liable by reason of the acquiring of properties, making of improvements, and issuance of bonds as in this complaint alleged.

3. That the land of this plaintiff is not liable to assessment by said irrigation district at this time for the purposes of paying interest or principal upon the bonds in said complaint referred to, in any sum or at all.

4. That the defendants and each of them be perpetually enjoined and restrained from attempting to make any assessment or levy against the lands of the plaintiff is this complaint described for the purpose of paying any sums on account of the principal or interest on the bonds in this complaint described.

5. That the title of the plaintiff in and to the above described land and the water rights appurtenant thereto be quieted as against any lien or claim of the holders of the [fol. 11] bonds above referred to, and the claim of the defendants that they have authority to levy assessments to provide revenue for the repayment of said bonds.

6. That the defendants and each of them be perpetually enjoined from assessing, levying or spreading upon the records of Benton County any assessment for the payment

of the interest or principal of said bonds against any particular tract of land within said district which will require the payment by the owner of said land of an amount in excess of the special benefit actually accruing to each particular tract of land by reason of the acquiring of water rights and making of improvements by the district, and the issuance of bonds as hereinabove referred to.

7. That there issue forthwith from this court a temporary restraining order, enjoining the defendants and each of them from assessing, levying, or spreading upon the records of Benton County, any assessments against the property of this plaintiff for the payment of principal or interest on the bonds hereinabove referred to, and that they be restrained from making and spreading upon the records of said district or of Benton County any assessment against any property in said district except for its share of the principal and interest on said bonds as determined by the special benefits accruing to each particular tract of land.

8. That a show-cause order issue directed to said defendants, and each of them, requiring them to appear in this court on a day and hour to be designated by the court to show cause why said injunction and restraining order should not be made and remain in full force pending final judgment in this cause.

9. For such other and further relief as may to the court seem equitable and just.

Venables, Graham & Howe, Albert Olsen, Attorneys for the Plaintiff.

Post Office Address-: Venables, Graham & Howe, Henry Building, Seattle, Washington; Albert Olsen, Federal Land Bank Bldg., Spokane, Washington.

[fol. 12] *Duly sworn to by J. T. Roberts. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 13] IN SUPERIOR COURT OF BENTON COUNTY

[Title omitted]

RESTRAINING ORDER AND ORDER TO SHOW CAUSE—Filed Jan. 13, 1931

Upon reading the verified complaint of the plaintiff, which has been filed in this matter, and on motion of R. J. Venables, one of the attorn*yes* for the plaintiff,

It is ordered that the defendants and each of them be and they are hereby enjoined and restrained from assessing, levying or spreading upon the records of the Richland Irrigation District, or Benton County, any assessment against any property in said District for the year 1931 for the payment of principal and interest on outstanding bonds, except for its share of the principal and interest of outstanding bonds as determined by the special benefits accruing to each particular tract of land including that of the plaintiff herein, as a result of the issuance of said bonds, until the further order of this Court. Bond fixed in the sum of $500.00.

It is further ordered that the defendants herein show cause before me at my chambers at the Court House, City of Prosser, County of Benton, on the 29th day of January, [fol. 14] 1931, at the hour of Ten o'clock A. M. of said day, why said restraining order should not be continued in full force and effect pendente lite and until a final decree is entered herein, and that a copy of this order be served upon said defendants and each of them at least three days before the time fixed for the hearing on the Show Cause Order herein.

Dated at Pasco, Washington, this 12th day of January, 1931.

Matt L. Driscoll, Judge.

[File endorsement omitted.]

[fols. 15-20] Bond on restraining order for $500.00, approved and filed January 13, 1931, omitted in printing.

[fol. 21] IN SUPERIOR COURT OF BENTON COUNTY

[Title omitted]

STIPULATION AS TO AGREED ORDER—Filed Feb. 5, 1931

It is hereby stipulated by and between the parties by their respective counsel, namely, Venables, Graham & Howe and Albert Olsen, for the plaintiff, Roberts, Mark Moulton for the defendant Richland Irrigation District, and the defendant C. J. Barnett, W. A. Stockman and W. C. McInnis, Directors of the Richland Irrigation District, Charles L. Powell for the defendants Harry Forsyth, Treasurer of Benton County, B. J. Pacius, Ira C. Hawley and H. S. Hughes, County Commissioners of Benton County, Washington, and Preston, Thorgrimson & Turner, for the interveners, J. T. S. Lyle, Dix Rowland, Charles Heath, T. H. Bowden and H. E. Davenport, individually and as Trustees, as follows:

1. That the Court may make and enter herein an agreed order, a copy of which is hereto attached.

2. That said order may be signed by the Judge at any place within the Judicial District in which said cause is pending.

3. The parties hereto, including interveners, do not by [fols. 22-24] this stipulation waive any of their respective rights herein and this stipulation and the order based thereon is and shall be without prejudice to the rights of any of the parties hereto.

Venables, Graham & Howe, Albert Olson, Attorneys for Plaintiff. M. M. Moulton, Attorneys for Defendant Richland Irrigation District and Directors of Richland Irrigation District. Charles L. Powell, Attorney for Defendants Harry Forsyth, Treasurer of Benton County; B. J. Pacius, Ira C. Hawley, and H. S. Hughes, County Commissioners of Benton County. Preston, Thorgrimson & Turner, Attorneys for Interveners, J. T. S. Lyle, Dix Rowland, Charles Heath, T. H. Bowden, and H. E. Davenport, Individually and as Trustees.

[File endorsement omitted.]

[fol. 25] IN SUPERIOR COURT OF BENTON COUNTY

[Title omitted]

ORDER MODIFYING RESTRAINING ORDER—Filed Feb. 5, 1931

This matter coming on duly and regularly for hearing on the 5th day of February, 1931, pursuant to that certain Order to Show Cause heretofore issued herein on the 12th day of January, 1931, returnable on the 29th day of January, 1931, at the hour of 10 o'clock A. M., which hearing was subsequently continued by a stipulation until the date hereof;

The plaintiff, appearing by its attorneys Venables, Graham & Howe, and Albert Olsen, the defendants, Richland Irrigation District, an irrigation district, C. J. Barnett, W. A. Stockman, W. C. McInnis, Directors of the Richland Irrigation District, appearing by Mark Moulton, their attorney, and the defendants Harry Forsyth, Treasurer of Benton County, Washington, B. J. Pacius, Ira C. Hawley, H. S. Hughes, County Commissioners of Benton County, Washington, appearing by their attorney, Charles L. Powell, Prosecuting Attorney for Benton County, and Interveners J. T. S. Lyle, Dix Rowland, Charles Heath, T. H. Bowden, and H. E. Davenport, individually and as Trustees, appearing by their attorneys Preston, Thorgrimson & Turner, and the Court being fully advised in the premises, [fol. 26] Now, therefore, upon stipulation of the parties on file herein, it is hereby ordered as follows:

1. That that certain restraining order heretofore issued herein, on the 12th day of January, 1931, restraining the defendants and each of them from assessing, levying or spreading upon the records of the Richland Irrigation District or Benton County, any assessments against any property in said District for the year 1931, for the payment of principal and interest on outstanding bonds, except for its share of the principal and interest of outstanding bonds as determined by the special benefits accruing to each particular tract of land, including that of the plaintiff herein, as a result of the issuance of said bonds, be and the same is hereby dissolved as to all land and property in said Richland Irrigation District, except that certain tract of real property belonging to the plaintiff, and referred to in

Paragraph 2 of plaintiff's Complaint, on file herein, and that as to said tract it be continued in full force and effect pendente lite, that said defendants be and they are hereby enjoined from levying any assessment against the real property of the plaintiff described in the Complaint, for the payment of any indebtedness evidenced by the outstanding bonds of said District, principal or interest, until the further order of this court herein.

2. That this order shall be without prejudice to the right of the defendants to assess said lands for any sums for which it may ultimately be found liable to be assessed.

3. That this order is without prejudice to the rights of any of the parties herto, including interveners.

Matt L. Driscoll, Judge.

[File endorsement omitted.]

[fol. 27] In Superior Court of Benton County

[Title omitted]

Stipulation as to Intervention—Filed Feb. 16, 1931

It is hereby agreed by the above named plaintiff and defendants that J. T. S. Lyle, Dix Rowland, Charles Heath, T. H. Bowden and H. E. Davenport, being the owners and holders of certain of the bonds issued by the defendant Richland Irrigation District set forth in the complaint herein, may intervene and be made parties to this action individually and as trustees, and as such intervenors that they may, if they see fit, file a demurrer to plaintiff's complaint before filing answer and complaint in intervention herein, and that the court may enter an order allowing them so to do.

Venables, Graham & Howe, Albert Olson, Attorneys for Plaintiff. M. M. Moulton, Attorneys for Defendant- Richland Irrigation District and Directors of Richland Irrigation District. Charles L. Powell, Attorney for Defendants Harry Forsyth, Treasurer of Benton County; B. J. Pacius, Ira C. Hawley, and H. S. Hughes, County Commis-

sioners of Benton County. Preston, Thorgrimson & Turner, Attorneys for Intervenors, J. T. S. Lyle, Dix Rowland, Charles Heath, T. H. Bowden, and H. E. Davenport, Individually and as Trustees.

[File endorsement omitted.]

[fol. 28] In Superior Court of Benton County

[Title omitted]

Order Permitting Intervention—Filed Feb. 16, 1931.

Upon written stipulation entered into between the above entitled parties,

It is now ordered that J. T. S. Lyle, Dix Rowland, Charles Heath, T. H. Bowden and H. E. Davenport, individually and as trustees, be permitted to intervene herein, and before filing answer and complaint in intervention to demur to plaintiff's complaint.

Done in open court this 14th day of February, 1931.

Matt L. Driscoll, Judge.

[File endorsement omitted.]

[fol. 29] In Superior Court of Benton County

No. 5607

J. T. Roberts, Plaintiff,

v.

Richland Irrigation District, an Irrigation District; C. J. Barnett, W. A. Stockman, and W. C. McInnis, Directors of the Richland Irrigation District, an Irrigation District, and Harry Forsyth, Treasurer of Benton County, Washington; B. J. Pacius, Ira C. Hawley, and H. S. Hughes, County Commissioners of Benton County, Washington, Defendants; J. T. S. Lyle, Dix Rowland, Charles Heath, T. H. Bowden, and H. E. Davenport, Individually and as Trustees, Intervenors

DEMURRER OF INTERVENORS—Filed Feb. 19, 1931

Come now the above named intervenors and demur to the complaint of plaintiff herein for the following reasons:

1. That the plaintiff has no legal capacity to sue.

2. That there is a defect of parties plaintiff.

3. That there is a defect of parties defendant.

4. That several causes of action have been improperly united.

5 That the action has not been commenced within the time limited by law.

6. That the complaint does not state facts sufficient to constitute a cause of action.

Preston, Thorgrimson & Turner, Attorneys for Intervenors.

Copy of within demurrer received Feb. 18, 1931.
R. J. Venables, Attorneys for ——.

[File endorsement omitted.]

[fol. 30] IN SUPERIOR COURT OF BENTON COUNTY

[Title omitted]

DEMURRER—Filed Feb. 28, 1931

Come now the defendants, Richland Irrigation District an irrigation district, C. J. Barnett, W. A. Stockman and W. C. McInnis, Directors of Richland Irrigation District, an irrigation district, and demur to the complaint of the plaintiff herein for the following reasons:

1. That the plaintiff has no legal capacity to sue.

2. That there is a defect of parties plaintiff.

3. That there is a defect of parties defendant.

4. That several causes of action have been improperly united.

5. That the action has not been commenced within the time limited by law.

6. That the complaint does not state facts sufficient to constitute a cause of action.

M. M. Moulton, Attorney for Richland Irrigation District and C. J. Barnett, W. A. Stockman, and W. C. McInnis, Directors of Richland Irrigation District.

[File endorsement omitted.]

[fol. 31] IN SUPERIOR COURT OF BENTON COUNTY

[Title omitted]

DEMURRER—Filed July 2, 1931

Come now the defendants, Ira C. Hawley, B. J. Pacius, and H. S. Hughes, County Commissioners of Benton County, Washington, and Harry Forsyth, County Treasurer of Benton County, Washington, and demur to the complaint of the plaintiff on the ground and for the reason:

1. That said complaint does not state facts sufficient to constitute a cause of action against these defendants, or any of them.

Charles L. Powell, Attorney for Defendants Ira C. Hawley, B. J. Pacius, and H. S. Hughes, County Commissioners of Benton County, Washington, and Harry Forsyth, County Treasurer of Benton County, Washington.

Due service of the foregoing demurrer, together with receipt of true copy thereof, is hereby acknowledged this 24 day of February, 1931.

Venables, Graham & Howe, Albert Olson, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 32] Superior Court of the State of Washington for Adams, Franklin, Benton Counties

Matt L. Driscoll, Judge

Pasco, Washington, June 19, 1931.

Venerables, Howe & Graham, Attorneys-at-Law, Henry Building, Seattle, Washington.

Re Roberts vs. Richland Irrigation District, an Irrigation District, et al.

Gentlemen: Upon the authority of the Hartung, Clancey, and other cases, the court has decided to sustain the demurrer of the interveners, J. T. S. Lyle, et al.

An Order may be prepared for the Court's signature in accordance herewith.

Yours very truly, Matt L. Driscoll.

MLD:RW.

Filed Sep. 26, 1931.

E. O. Keene, Clerk, by L. Keene, Deputy.

[fol. 33] In Superior Court of Benton County

No. 5607

J. T. Roberts, Plaintiff,

v.

Richland Irrigation District, an Irrigation District; C. J. Barnett, W. A. Stockman, and W. C. McInnis, Directors of the Richland Irrigation District, an Irrigation District, and Harry Forsyth, Treasurer of Benton County, Washington; B. C. Pacius, Ira C. Hawley, and H. S. Hughes, County Commissioners of Benton County, Washington, Defendants; J. T. S. Lyle, Dix Rowland, Charles Heath, T. H. Bowden, and H. E. Davenport, Individually and as Trustees, Intervenors.

Order Sustaining Demurrer and Judgment—Filed Sept. 10, 1931

This cause having come on to be heard before the Court on the 1st day of April, 1931, upon the demurrers of defendants and intervenors to the Complaint herein, plaintiff

being represented by Venables, Graham & Howe, and Albert Olson, his attorneys; and the defendants Richland Irrigation District, an irrigation district, C. J. Barnett, W. A. Stockman and W. C. McInnis, Directors of the Richland Irrigation District, an irrigation district, being represented by their attorney, M. M. Moulton; the defendants Harry Forsyth, Treasurer of Benton County, Washington, and B. C. Pacius, Ira C. Hawley and H. S. Hughes, Commissioners of Benton County, Washington, being represented by their attorney, Charles L. Powell; and the intervenors, J. T. S. Lyle, Dix Rowland, Charles Heath, T. H. Bowden and H. E. Davenport, individually and as Trustees, being represented by their attorneys, Preston, Thorgrimson & Turner; and the Court having heard the argument of coun- [fol. 34] sel for the parties hereto, and having read their briefs herein, and having been fully advised in the premises;

Now, therefore, it is hereby ordered, adjudged, and decreed that demurrers of defendants and intervenors to each and every separate cause of action stated in the Complaint be, and the same are hereby sustained.

Plaintiff having elected to stand upon his Complaint and not to plead further,

Now, therefore, it is further ordered, adjudged, and decreed that the Complaint heretofore filed in this cause, and each and every separate cause of action be, and the same is hereby dismissed.

It is further ordered, adjudged, and decreed that defendants and intervenors do have and recover their costs and disbursements made necessary herein.

To all of which plaintiff excepts, and his exceptions are duly allowed.

Done in open Court, this 10 day of September, 1931.

Matt L. Driscoll, Judge.

O. K.

Preston, Thorgrimson & Turner, Attys. for Intervenors. M. M. Moulton, Atty. for Richland Irrigation District and Directors. Charles L. Powell, Attorney for County Officers.

Presented by

Venables, Graham & Howe, by B. Goodwin.

[File endorsement omitted.]

[fol. 35] In Superior Court of Benton County

[Title omitted]

Notice of Appeal—Filed Sept. 10, 1931

To the defendants C. J. Barnett, W. A. Stockman, and W. C. McInnis, Directors of the Richland Irrigation District, an irrigation district and to Richland Irrigation District, an irrigation district, and to H. M. Moulton, their attorney:

To the defendants, Harry Forsyth, Treasurer of Benton County, Washington; B. C. Pacius, Ira C. Hawley, and H. S. Hughes, Commissioners of Benton County, Washington, and to Charles L. Powell, their attorney:

To J. T. S. Lyle, Dix Rowland, Charles Heath, T. H. Bowden, and H. E. Davenport, individually and as trustees, intervenors, and to Preston, Thorgrimson & Turner, their attorneys:

You, and each of you, are hereby notified that the above named plaintiff, J. T. Roberts, hereby appeals to the Supreme Court of the State of Washington from the judgment entered in the above entitled cause on the 10th day of September, 1931, in favor of the defendants and the intervenors, and against the plaintiff, and from the whole thereof.

Venables, Graham & Howe, Albert Oleson, Attorneys for Plaintiff.

[fol. 36] Service of within notice admitted this 10th day of September, 1931.

M. M. Moulton, H. M. Moulton, Attorney for Defendant- Richland Irrigation *Irrigation* District and Directors of Richland Irrigation District. Charles L. Powell, Charles L. Powell, Attorney for Defendants Harry Forsyth, Treasurer of Benton County; B. J. Pacius, Ira C. Hawley, and H. S. Hughes, County Commissioners of Benton County. Preston, Thorgrimson & Turner, Preston, Thorgrimson & Turner, Attorneys for Intervenors, J. T. S. Lyle, Dix Rowland, Charles Heath, T. H. Bowden, and H. E. Davenport, Individually and as Trustees.

[File endorsement omitted.]

[fol. 37] In Superior Court of Benton County

[Title omitted]

Order Fixing Amount of Bond on Appeal—Filed Sept. 10, 1931

Plaintiff having appealed to the Supreme Court of the State of Washington from the judgment made and entered in this cause, on the 10th day of September, 1931, and said plaintiff having applied to this Court for an order fixing the penalty of the bond to be given by said plaintiff under Section 1723 Remington's Compiled Statutes of Washington,

Now, therefore, it is hereby ordered that the penalty of said bond be given by said plaintiff in order to keep the injunction granted in the cause in full force and effect be, and the same is hereby fixed in the sum of $1000.00.

Done in open Court this 10th day of September, 1931.

Matt L. Driscoll, Judge.

O. K.

Preston, Thorgrimson & Turner, Attys. for Intervenors. M. M. Moulton, Atty. for Richland Irrigation District and Directors. Charles L. Powell, Attorney for County Officers.

Presented by

Venables, Graham & Howe, by B. Goodwin.

[File endorsement omitted.]

[fols. 38 & 39] Injunction and cost bond on appeal for $1,000, approved and filed September 10, 1931, omitted in printing.

[fol. 40] In Supreme Court of Washington

Excerpts from Printed Reply Brief of Appellant

Pages 1 and 2

"One question only is presented for consideration by the record in this case, to-wit:

"Has an irrigation district the power to levy assessments against the property of an individual landowner in an amount in substantial excess of the total benefits conferred

upon his land by the improvement for the cost of which the assessments are levied?

"It is the contention of the appellant that such a levy constitutes a taking of property without due process of law and is therefore in violation of the Fourteenth Amendment of the Constitution of the United States."

[fol. 41] IN SUPREME COURT OF WASHINGTON

No. 23513, Department One

J. T. ROBERTS, Appellant,

v.

RICHLAND IRRIGATION DISTRICT et al., Respondents; J. T. S. LYLE et al., Interveners

ORDER FOR HEARING EN BANC— Filed April 18, 1932

It is hereby ordered that the above-entitled cause be set for rehearing en banc at the May, 1932, Term of Court.

Dated this 18 day of April, 1932.

By the Court:

Tolman, Chief Justice.

[File endorsement omitted.]

[fol. 42] IN SUPREME COURT OF WASHINGTON

En Banc

No. 23513

J. T. ROBERTS, Appellant,

v.

RICHLAND IRRIGATION DISTRICT, an Irrigation District; C. J. Barnett, W. A. Stockman, and W. C. McInnis, Directors of the Richland Irrigation District, and Harry Forsyth, Treasurer of Benton County, Washington; B. A. Pacius, Ira C. Hawley, and H. S. Hughes, County Commissioners of Benton County, Washington, Respondents; J. T. S. Lyle, Dix Rowland, Charles Heath, T. H. Bowden, and H. E. Davenport, Individually and as Trustees, Intervenors

OPINION—Filed Aug. 8, 1932

J. T. Roberts, on behalf of himself and others similarly situated, brought this action to enjoin the Richland Irrigation District and its directors and the commissioners and the treasurer of Benton county from levying, or spreading upon the record of the county, any assessment for the payment of the interest or the principal of the district's bonds (which were issued to pay for district improvements)

"against any particular tract of land within said district which will require the payment by the owner of said land of an amount in excess of the special benefit actually accruing to each particular tract of land by reason of the acquiring of water rights and making of improvements by the district, and the issuance of bonds as hereinabove referred to."

The intervenors (certain owners and holders of bonds issued by the district), who appeared individually and as trustees, and the defendants, interposed demurrers, which were sustained. The appeal is from the judgment of dismissal rendered upon the plaintiff's refusal to plead further.

The allegations of the complaint are, substantially, as follows: Appellant is the owner of forty acres of land in the Richland Irrigation District. That district was legally established and its organization approved and confirmed judicially in 1919. Thereafter, pursuant to statutory re- [fol. 43] quirements, the district issued bonds in the sum of $538,000.00 the proceeds from the sale of which were used to purchase additional water rights and to pay the cost of improvements essential to the irrigation of the lands within the district. The bonds bear interest at the rate of six per centum per annum payable semi-annually. By reason of the improvements made by the district the thirty-five irrigable acres of appellant's forty-acre tract were benefitted ten dollars an acre; that is, total benefits of three hundred and fifty dollars accrued to appellant's forty-acre tract by reason of the improvements made by the district. The ultimate amount of the liability of the appellant's land for assessments for bond purposes during the ten-year maturing period of the bonds is five hundred and sixty dollars (three hundred and fifty dollars plus interest of six

per centum per annum for ten years). For the years 1920 to 1929, inclusive, appellant paid an aggregate of $1,168.65 in assessments against his forty acres for the payment of interest and principal of the bonds described above. The directors of the district have made all preparations for, and are threatening to levy for the year 1930 an assessment of $757.53 against the lands of the appellant for the purpose of meeting interest and principal on the bonds. No part of the levy is made on account of, or with reference to, any special benefit accruing to the real property of the appellant. The assessment was levied for the purpose of creating a fund to take up or eliminate the deficiencies in the bond interest and bond retirement funds "due wholly or in part to a failure of certain landowners within the district to pay assessments which have heretofore or will hereafter be levied against lands in said district belonging to such other persons." The directors of the district informed the appellant that it is their fixed policy and that they propose to

"assess and re-assess all delinquencies which have heretofore or may hereafter accrue against the lands of this plaintiff and other lands in the district which continue to pay their assessments, without delinquency, until the lands of this plaintiff, and the lands of other persons who have and who shall hereafter pay the assessments levied will [fol. 44] create a fund sufficient to pay the entire outstanding indebtedness, and retire said bonds, both principal and interest, and that they propose to make such assessment without reference to the special benefits which have accrued to the real property of this plaintiff and any other landowners in the district who may continue to pay their assessments, but to be governed and determined in making said assessments solely by a consideration of the amount of money required to pay said indebtedness, * * *"

Is the annual assessment against each tract of land within an irrigation district for the payment of interest or the principal of bonds issued to pay the cost of irrigation district improvements limited to the maximum benefits accruing to the tract of land by reason of such improvements? That is the only question, which is not an open one in this state, presented by this appeal.

Counsel for appellant contend that the irrigation act requires that the maximum benefits received by such tract of land within the district from the issuance of the district bonds be determined annually; and that the benefits so ascertained establish the limit of the assessment against each tract of land for bond purposes. It is insisted that the statute, if it authorize the annual levy of assessments for bond purposes in excess of benefits received from such bond issue, is unconstitutional in that the taking of property without due process of law is thereby made possible.

No question is raised as to the legality of the formation of the district or of the inclusion of all lands within the district. Counsel concede that the aggregate benefits to the lands within the district equal the bonded indebtedness of the district and that the lands of the appellant have been benefited to some extent. It is not contended that, as between appellant's land and other privately owned land, the former is disproportionately assessed. The question, argue counsel for appellant, is:

"Assuming the legal organization of an irrigation district after notice and hearing upon the question of organization, boundaries, inclusions of land to be benefited and the total amount of benefits to all the lands within the district, is the individual landowner entitled to another hearing after due notice for the purpose of allocating to his land its just proportion of the benefits, and does the benefit thus allocated limit his liability to pay?"

[fol. 45] An irrigation district is a public corporation having some of the powers of a municipal corporation. The bond obligation is a general corporate obligation. The landowner is not entitled to a segregation of his share of the obligation at the time it is created, or at a later time. There is no provision in the irrigation act for a segregation at any time. The obligation is a general one and all lands within the district are subject to taxation for the payment of the entire obligation. State ex rel. Clancy v. Columbia Irrigation District, 121 Wash. 79, 208 Pac. 27; State ex rel. Wells v. Hartung, 150 Wash. 490, 274 Pac. 181.

In 1919 there was a due adjudication of the organization of the district determining the lands to be included within the district, the amount of bonds to be issued and the

interest to be paid thereon. It must be conclusively presumed, from that adjudication, as we said in State ex rel. Wells v. Hartung, supra,

"that the total benefits to the lands comprised in the district were then finally adjudicated. Each tract of land within the district then became generally liable for the payment of the bonds and interest."

The bond obligation was established. That liability was adjudicated to be within the limits of total benefits. Under the statute (sec. 7434, Rem. Comp. Stat.) all lands within the district became and will remain subject to specific assessment, in proportion to benefits, until the obligation is paid. The statute provides that irrigation district bonds and interest thereon shall be paid by revenue derived from an annual assessment upon the real property of the district,

"and all the real property in the district shall be and remain liable to be assessed for such payment until fully paid as hereinafter provided. Sec. 7434, supra.

The first tribunal determined at the beginning what lands would be benefited and whether the aggregate of benefits to those lands would equal the cost of irrigating them. By that tribunal the appellant was afforded a hearing. There was no invasion of appellant's constitutional rights. The statute provides for other hearings as frequently as there [fol. 46] will be occasion to allocate to appellant's lands specific amounts of benefit. The district board is required to make assessments annually for the purpose of raising sufficient money for maintenance, interest on bonds and principal of bonds. The sum required shall be apportioned among the benefited properties according to benefits. Sec. 7436, Rem. Comp. Stat. At the time of making the annual levy the board shall estimate the amount of all probable delinquencies on that levy and shall levy a sufficient amount to cover the same and a further amount sufficient to cover any deficit that may have resulted from delinquent assessments for any preceding year. Sec. 7440, Rem. Comp. Stat. There shall be a hearing on the assessment-roll, before the district directors acting as a board of equalization, and adequate notice shall be given to all concerned of the time and place of the hearing. The board shall hear and deter-

mine such objections to the assessment-roll as may come before it. Section 7438 and 7439, Rem. Comp. Stat. Patently there is no denial of the right of a landowner to a hearing upon the amount of his assessment.

The benefits to the appellant's lands are not only the benefits accruing by reason of the improvements for the payment of which the district issued bonds in the amount of five hundred and thirty-eight thousand dollars. Lands acquired by the district for unpaid assessments are assets of the district. An added benefit therefrom accrues to the district as a whole and to each landowner individually. Such benefit is a basis, as are the unpaid assessments on other lands within the district, for the secondary liability to which reference is made in State ex rel. Wells v. Hartung, supra:

"While appellants argue that interest cannot be considered as part of the benefits for which assessments may be levied, when any lands within the district have paid as much as the total benefits, yet every tract of land within the district became then liable, not only for the principal as the amount of the benefits, but for the interest. Since it was heretofore so judicially determined, the directors have no [fol. 47] option, under the statute quoted, but to levy assessments as the statutes specify.

"Nor have the land owners any right to question the assessments on the theory that they have paid assessments equalling the total amount of their benefits. The lands passing into the ownership of the district are not to be considered as liabilities, but assets. It may be that, during periods of depression in the market value of such lands, such as have prevailed for some years, the lands do not appear to be assets. Their temporary exclusion from liability to pay assessments is anticipated by the provisions of the sta-utes we have quoted. These obsercations apply to intervenors Schlagel and others similarly situated, as well as to the directors of the district, in the operation of the law.

"Appellants argue that the effect of the Clancy case, supra, has been overruled, modified, or repudiated in some of our later cases. Kadow v. Paul, supra, is cited to the effect that the liability of one owner in a diking district to make up the delinquency of another is secondary and not

primary; but that secondary liability, if it exists here, is covered by the fact that the delinquencies actually exist here and the statutes require them to be made up. State ex rel. Wells v. Hartung, supra.

"Supplemental assessments, in providing for the payment for such improvements, are recognized as a legitimate part of the proceeding necessary to raise the money and to pay bonds issued to meet the cost; and if, in the process of collection, it shall appear that some of the assessed land fails to pay the assessment and is appropriated and sold, the distribution of the deficit thus arising, to be included in another assessment, is only meeting the to be expected cost of the improvement. When the operation of the law works uniformly as against all parts of the assessment district, and results in a higher cost of the improvement, and an increased assessment on all the owners of land who have paid, it violates no constitutional right of theirs as long as their benefits continue respectively to exceed their individual assessments."

Kadow v. Paul, 274 U. S. 175.

Counsel for appellant call attention to the fact that Soeman v. Chestnut Valley Irr. District, 74 Mont. 111, 238 Pac. 879, cited by us in State ex rel. Wells v. Hartung, supra, was overruled by State ex rel. Malott v. Board of County Commissioners, 89 Mont. 37, 296 Pac. 1, in which the Supreme Court of Montana held that irrigation district bonds are not general obligations. We note, however, that the Montana Supreme Court states, as follows, that under the Washington statute, which differs materially from the Montana statute, such bonds are general obligations:

"Many of the decisions of other courts cited are not helpful in determin-g the matters submitted herein. This because upon investigation we find that in many instances the provisions of the statutes upon which such holdings are predicated are different from the provisions of our statute. The decisions of the Supreme Court of Washington in the cases of State ex rel. Clancy v. Columbia Irr. Dist., 121 Wash. 79, 208 Pac. 27, and State v. Hartung, 150 Wash. 590, 274 P. 181, are cited by relators. Both of these cases hold that the bonds of irrigation districts are general obliga-[fols. 47a-65] tions. But an examination of the Washing-

ton statute reveals that the law of that state contains the following provision relating to the levy of annual assessments: 'The Board shall also at the time of making the annual levy, estimate the amount of all probable delinquencies on said levy and shall thereupon levy a sufficient amount to cover the same and a further amount sufficient to cover any deficit that may have resulted from delinquent assessments for any preceding year.' Section 6473, Remington Code, 1915, as amended by Session Laws of 1921, p. 448. Our statute contains no such provision."

Our irrigation statute in no wise offends against the state Constitution or the United States Constitution. We have considered all of the authorities cited and deem it unnecessary to review them, as State ex rel. Wells v. Hartung, 150 Wash. 590, 274 Pac. 181, is determinative of the case at bar.

The judgment is affirmed.

Millard, J.

We concur:

Tolman, C. J.; Parker, J.; Mitchell, J.; Holcomb, J.; Main, J.; Beals, J.; Herman, J.

[fol. 66] In Supreme Court of Washington

[Title omitted]

Order Denying Rehearing—Filed Sept. 28, 1932

The court having considered the appellant's petition for a rehearing herein;

It is ordered that the said petition be and it hereby is denied.

Dated this 28 day of September, 1932.

By the Court:

Tolman, Chief Justice.

[File endorsement omitted.]

[fol. 67] IN SUPREME COURT OF WASHINGTON

No. 23513

J. T. ROBERTS, Appellant,

vs.

RICHLAND IRRIGATION DISTRICT et al., Respondents,

JUDGMENT—Sept. 28, 1932

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Benton County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 28th day of September, A. D. 1932, on motion of M. M. Moulton, Preston, Thorgrimson & Turner, of counsel for —— ——, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby affirmed, with costs; and that the said Richland Irrigation District et al. have and recover of and from the said J. T. Roberts and from Fidelity & Deposit Co. of Maryland, surety, the costs of this action, taxed and allowed at Eighty & 90/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 68] IN SUPREME COURT OF WASHINGTON

[Title omitted]

Petition for Order Allowing Appeal, Assignments of Error, and Prayer for Reversal

PETITION FOR ORDER ALLOWING APPEAL

Considering himself aggrieved by the final decision of the Supreme Court of the State of Washington in the above entitled cause, the Plaintiff herein, J. T. Roberts, hereby prays that an order allowing appeal be issued herein, and for an order fixing the amount of the bond thereon.

Assignments of Error

The said J. T. Roberts assigns the following errors in [fol. 69] the record and proceedings in the said case:

(1) The Supreme Court of the State of Washington erred in affirming the order of the Superior Court for Benton County of the State of Washington sustaining demurrers of all adverse parties to Plaintiff's Complaint.

(2) The Supreme Court of the State of Washington erred in sustaining the judgment of the Superior Court for Benton County, of the State of Washington, dismissing Plaintiff's Complaint with costs upon his refusal to plead further after demurrers thereto of all adverse parties had been sustained.

(3) The Supreme Court of the State of Washington erred in overruling the contention of the Appellant that a State Statute, to wit: Irrigation District Law of the State of Washington, embodied in Sections 7417 to 7505, inclusive, pages 1701 to 1761, inclusive, Remington's Compiled Statutes of Washington 1922, Volume II, Title XLVIII, Chapter IV, as amended by Sections 7417 to 7505-5, inclusive, pages 973 to 999, inclusive, Remington's Compiled Statutes of Washington 1927 Supplement, Title XLVIII, Chapter IV, and as amended by Chapter 181 of the Session Laws of the State of Washington for 1929, Sections 1 to 3, inclusive, pages 469 to 474, inclusive, and by Chapter 185 of the Session Laws of the State of Washington for 1929, Sections 1 to 4, inclusive, pages 478 to 487, inclusive, as applied, was repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States, and in holding that the said statute as applied is valid and does not transgress the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(4) The Supreme Court of the State of Washington erred in holding that the Legislature of the State of Washington [fol. 70] has the power, by statutory enactment, to confer upon an irrigation district the power to levy local improvement assessments in substantial excess of and wholly without regard to benefits conferred upon the real property assessed, and that a statute expressly conferring such power

does not contravene the due process clause of the Fourteenth Amendment to the Constitution of the United States.

PRAYER FOR REVERSAL

For which errors the Plaintiff herein, J. T. Roberts, hereby prays that the judgment of the Supreme Court of the State of Washington, made and entered herein on the 28th day of September, 1932, be reversed and that a judgment, with costs, be rendered in favor of said Plaintiff.

Dated this 15 day of October, 1932.

Charles H. Farrell, Venables, Graham & Howe, Albert Olsen, Attorneys for Appellant.

[fol. 71] IN SUPREME COURT OF WASHINGTON

[Title omitted]

AFFIDAVIT OF SERVICE

COUNTY OF KING,
Western District of Washington,
Northern Division,
United States of America, ss:

Bernard Goodwin, first being duly sworn, on oath deposes and says:

That he is and at all times herein mentioned was a citizen of the United States, and a resident of the State of Washington, over the age of 21 years and competent to be a witness in the within entitled action.

That he is not a Plaintiff in the within action.

That on the 17 day of October, 1932, he personally served [fol. 72] the Petition for Order Allowing Appeal, the Assignments of Error, and Prayer for Reversal, hereto attached upon the Defendants and Appellees, B. J. Pacius, Ira C. Hawley and H. S. Hughes, County Commissioners of Benton County, Washington, and Harry Forsyth, Treasurer of Benton County, Washington, by then and there personally delivering and leaving with C. L. Powell, Attorney of Record for said Defendants and Appellees, one true

and correct copy of the said Petition for Order Allowing Appeal, Assignments of Error, and Prayer for Reversal, hereto attached.

Bernard Goodwin.

Subscribed and sworn to before me this 18 day of October, 1932. Thomas M. Green, Jr., Notary Public in and for the State of Washington, Residing at Seattle. (Notarial Seal.)

[fol. 73] IN SUPREME COURT OF WASHINGTON

[Title omitted]

AFFIDAVIT OF SERVICE

COUNTY OF KING,
Western District of Washington,
Northern Division,
United States of America, ss:

Bernard Goodwin, first being duly sworn, on oath deposes and says:

That he is and at all times herein mentioned was a citizen of the United States, and a resident of the State of Washington, over the age of 21 years and competent to be a witness in the within entitled action.

That he is not a Plaintiff in the within action.

That on the 18 day of October, 1932, he personally served the Petition for Order Allowing Appeal, the Assign-
[fol. 74] ments of Error, and Prayer for Reversal hereto attached upon the Intervenors and Appellees, J. T. S. Lyle, Dix Rowland, Charles Heath, T. H. Bowden and H. E. Davenport, Individually and as Trustees, in the County of King, State of Washington, by then and there personally delivering and leaving with O. B. Thorgrimson of the firm of Preston, Thorgrimson & Turner, Attorneys of Record for said Intervenors and appellees, one true and correct copy of the said Petition for Order Allowing Appeal, As-

signments of Error, and Prayer for Reversal, hereto attached, in his office, Room 2000, Northern Life Tower, Seattle, Washington, County of King, State of Washington.

Bernard Goodwin.

Subscribed and sworn to before me this 18 day of October, 1932. Thomas M. Green, Jr., Notary Public in and for the State of Washington, Residing at Seattle. (Notarial Seal.)

[fol. 75] In Supreme Court of Washington

[Title omitted]

Affidavit of Service

County of King,
Western District of Washington,
Northern Division,
United States of America, ss:

Bernard Goodwin, first being duly sworn, on oath deposes and says:

That he is and at all times herein mentioned was a citizen of the United States, and a resident of the State of Washington, over the age of 21 years and competent to be a witness in the within entitled action.

That he is not a plaintiff in the within action.

That on the 17 day of October, 1932, he personally served the Petition for Order Allowing Appeal, the Assignments [fol. 76] of Error, and Prayer for Reversal, hereto attached upon the Defendants and Appellees, Richland Irrigation District, an irrigation district, C. J. Barnett, W. A. Stockman and W. C. McInnis, Directors of the Richland Irrigation District, an irrigation district, in Kennewick, Benton County, State of Washington, by then and there personally delivering and leaving with M. M. Moulton, Attorney of Record for said Defendants and Appellees, one true and correct copy of the said Petition for Order Allow-

ing Appeal, Assignments of Error and Prayer for Reversal, hereto attached.

Bernard Goodwin.

Subscribed and sworn to before me this 18 day of October, 1932. Thomas M. Green, Jr., Notary Public in and for the State of Washington, Residing at Seattle. (Notarial Seal.)

[fol. 77] In Supreme Court of Washington

[Title omitted]

Order Allowing Appeal

Upon consideration of the Petition for Appeal to the Supreme Court of the United States filed herein by J. T. Roberts, Appellant, and upon examination of the record herein, including Petition for Order Allowing Appeal, Assignments of Error, Prayer for Reversal, and Statement of Jurisdiction, as required by Rule 12 (1) of the Supreme Court of the United States, and desiring to give said petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter, and it appearing that said J. T. Roberts is the only party Plaintiff in said cause, and because in the record, proceedings, and judgment in the highest [fol. 78] Court of the State of Washington in which a decision could be had between J. T. Roberts, Appellant, and Richland Irrigation District, an irrigation district, C. J. Barnett, W. A. Stockman and W. C. McInnis, Directors of the Richland Irrigation District, and Harry Forsyth, Treasurer of Benton County, Washington, B. J. Pacius, Ira C. Hawley and H. S. Hughes, County Commissioners of Benton County, Washington, Defendants and Appellees; and J. T. S. Lyle, Dix Rowland, Charles Heath, T. H. Bowden and H. E. Davenport, individually and as Trustees, Intervenors, and Appellees, and wherein was drawn in question the validity of a Statute of a State on the ground of it being repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States, and the decision was in favor of its valid-

ity, it appears that the said J. T. Roberts is entitled to have the judgment reviewed by the Supreme Court of the United States, and has presented a petition for Appeal and Assignments of Error and Prayer for Reversal to that end.

It is hereby ordered:

(I) That the Petition for Appeal be and the same is hereby allowed, and that a certified transcript of the record, proceedings and judgment aforesaid, and all things concerning the same, be transmitted to the Supreme Court of the United States at Washington, in the District of Columbia, within sixty (60) days from the date hereof, so that the said Supreme Court may examine and consider the same, and correct the errors therein, if any have occurred, and cause further to be done what is right and what is in accordance with the laws and customs of the United States, and

It is further ordered:

(II) That a bond on appeal, to act as cost bond and supersedes, be fixed in the sum of $2,000.00 as the law directs.

Dated at Olympia, Washington, this 15 day of October, 1932.

Warren W. Tolman, Chief Justice of the Supreme Court of the State of Washington.

Attest:

F. S. Guyot, Deputy Clerk. (Seal of Supreme Court.)

[fol. 79] In Supreme Court of Washington

[Title omitted]

Affidavit of Service

County of King,
Western District of Washington,
Northern Division,
United States of America, ss:

Bernard Goodwin, first being duly sworn, on oath deposes and says:

That he is and at all times herein mentioned was a citizen of the United States, and a resident of the State of Wash-

ington, over the age of 21 years and competent to be a witness in the within entitled action.

That he is not a Plaintiff in the within action.

That on the 17 day of October, 1932, he personally served [fol. 80] the Order Allowing Appeal hereto attached upon the Defendants and Appellees, Richland Irrigation District, an irrigation district, C. J. Barnett, W. A. Stockman and W. C. McInnis, Directors of the Richland Irrigation District, an irrigation district, in Kennewick, Benton County, State of Washington, by then and there personally delivering and leaving with M. M. Moulton, Attorney of Record for said Defendants and Appellees, one true and correct copy of the said Order Allowing Appeal hereto attached.

Bernard Goodwin.

Subscribed and sworn to before me this 18 day of October, 1932. Thomas M. Green, Jr., Notary Public in and for the State of Washington, Residing at Seattle. (Notarial Seal.)

[fol. 81] IN SUPREME COURT OF WASHINGTON

[Title omitted]

AFFIDAVIT OF SERVICE

COUNTY OF KING,
Western District of Washington,
Northern Division,
United States of America, ss:

Bernard Goodwin, first being duly sworn, on oath deposes and says:

That he is and at all times herein mentioned was a citizen of the United States, and a resident of the State of Washington, over the age of 21 years and competent to be a witness in the within entitled action.

That he is not a Plaintiff in the within action.

That on the 17 day of October, 1932, he personally served [fol. 82] the Order Allowing Appeal hereto attached upon the Defendants and Appellees, B. J. Pacius, Ira C. Hawley

and H. S. Hughes, County Commissioners of Benton County, Washington, and Harry Forsyth, Treasurer of Benton County, Washington, by then and there personally delivering and leaving with C. L. Powell, Attorney of Record for said Defendants and Appellees, one true and correct copy of the said Order Allowing Appeal hereto attached.

Bernard Goodwin.

Subscribed and sworn to before me this 18 day of October, 1932. Thomas M. Green, Jr., Notary Public in and for the State of Washington, Residing at Seattle. (Notarial Seal.)

[fol. 83] IN SUPREME COURT OF WASHINGTON

[Title omitted]

AFFIDAVIT OF SERVICE

COUNTY OF KING,
Western District of Washington,
Northern Division,
United States of America, ss:

Bernard Goodwin, first being duly sworn, on oath deposes and says:

That he is and at all times herein mentioned was a citizen of the United States, and a resident of the State of Washington, over the age of 21 years and competent to be a witness in the within entitled action.

That he is not a Plaintiff in the within action.

That on the 18 day of October, 1932, he personally [fol. 84] served the Order Allowing Appeal hereto attached upon the Intervenors and Appellees, J. T. S. Lyle, Dix Rowland, Charles Heath, T. H. Bowden and H. E. Davenport, Individually and as Trustees, in the County of King, State of Washington, by then and there personally delivering and leaving with O. B. Thorgrimson of the firm of Preston, Thorgrimson & Turner, Attorneys of Record for said Intervenors and Appellees, one true and correct

copy of the said Order Allowing Appeal hereto attached, in his office, Room 2000, Northern Life Tower, Seattle, Washington, County of King, State of Washington.

Bernard Goodwin.

Subscribed and sworn to before me this 18 day of October, 1932. Thomas M. Green, Jr., Notary Public in and for the State of Washington, Residing at Seattle. (Notarial Seal.)

[fol. 85] In Supreme Court of Washington

[Title omitted]

Certificate of Chief Justice of the Supreme Court of the State of Washington re Finality of Judgment

I, Warren W. Tolman, Chief Justice of the Supreme Court of the State of Washington, hereby certify:

That the Supreme Court of the State of Washington is the highest Court of said State in which a decision in the above entitled cause could be had, and

That upon affirmance by said Supreme Court, the judgment in said cause became final, leaving nothing to be done by the Court below but to execute the judgment already rendered, which disposes of all elements of controversy.

Warren W. Tolman, Chief Justice of the Supreme Court of the State of Washington.

Dated this 15 day of October, 1932.

Attest:

F. S. Guyot, Deputy Clerk. (Seal of the Supreme Court of the State of Washington.)

[fol. 86] We hereby acknowledge service of the foregoing Certificate of Chief Justice of the Supreme Court of the State of Washington re Finality of Judgment, and the receipt of a true copy thereof, this 18 day of October, 1932.

Preston, Thorgrimson & Turner, Attorneys for J. T. S. Lyle, Dix Rowland, Charles Heath, T. H. Bowden, and H. E. Davenport, Individually and as Trustees, Intervenors and Appellees.

This 17th day of October, 1932.

M. M. Moulton, Attorney for Richland Irrigation District, an Irrigation District; C. J. Barnett, W. A. Stockman, and W. C. McInnis, Directors of Richland Irrigation District, an Irrigation District, Defendants and Appellees. Charles L. Powell, Attorney for B. J. Pacius, Ira C. Hawley, and H. S. Hughes, County Commissioners of Benton County, Washington, and Harry Forsyth, Treasurer of Benton County, Washington, Defendants and Appellees.

[fol. 87] In Supreme Court of Washington

[Title omitted]

Certificate of Chief Justice of the Supreme Court of the State of Washington re Consideration of Federal Constitutional Question

I, Warren W. Tolman, Chief Justice of the Supreme Court of the State of Washington, hereby certify

That in the above entitled cause the question whether the irrigation district law of the State of Washington embodied in Sections 7417-7505, inclusive, pages 1710 to 1761, inclusive, Remington's Compiled Statutes of Washington 1922, Volume II, Title XLVIII, Chapter IV, and as amended by Sections 7417 to 7505-5, inclusive, pages 973 to 999, inclusive, Remington's Compiled Statutes of Washington 1927 Supplement, Title XLVIII, Chapter IV, and as [fols. 88-120] amended by Chapter 181 of the Session Laws of the State of Washington for 1929, Sections 1 to 3, inclusive, pages 469 to 474, inclusive, and by Chapter 185 of the Session Laws of the State of Washington for 1929, Sections 1 to 40, inclusive, pages 478 to 487, inclusive, and its application in this case, is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, providing that no State shall deprive any person of life, liberty or property without due process of law, was considered and passed upon by this Court.

Dated this 15 day of October, 1932.

Warren W. Tolman, Chief Justice of the Supreme Court of the State of Washington.

Attest:

F. S. Guyot, Deputy Clerk. (Seal of the Supreme Court of the State of Washington.)

We hereby acknowledge service of the foregoing Certificate of Chief Justice of the Supreme Court of the State of Washington re Consideration of Federal Constitutional Question, and the receipt of a true copy thereof, this 18 day of October, 1932.

Preston, Thorgrimson & Turner, Attorneys for J. T. S. Lyle, Dix Rowland, Charles Heath, T. H. Bowden, and H. E. Davenport, Individually and as Trustees, Intervenors and Appellees.

This 17th day of Oct., 1932.

M. M. Moulton, Attorney for Richland Irrigation District, an Irrigation District; C. J. Barnett, W. A. Stockman, and W. C. McInnis, Directors of Richland Irrigation District, an Irrigation District, Defendants and Appellees. Charles L. Powell, Attorney for B. J. Pacius, Ira C. Hawley, and H. S. Hughes, County Commissioners of Benton County, Washington, and Harry Forsyth, Treasurer of Benton County, Washington, Defendants and Appellees.

[fols. 121 & 122] Supersedeas bond on appeal for $2,000, approved October 15, 1932, omitted in printing.

[fol. 123] Order approving bond omitted in printing.

[fols. 124-129] Affidavits of service of order approving bond omitted in printing.

[fols. 130 & 131] Citation, in usual form, showing service on M. M. Moulton et al., filed October 18, 1932, omitted in printing.

[fol. 132] IN SUPREME COURT OF WASHINGTON

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Supreme Court of the State of Washington:

Please prepare a transcript of the record in the above entitled cause to be filed in the office of the Clerk of the Supreme Court of the United States at Washington, District of Columbia, pursuant to order allowing appeal heretofore issued in said cause, and include in said transcript the following pleadings, proceedings and papers on file herein and from the "Transcript of Record" filed herein from the Superior Court for Benton County (Cause No. 5607 in said Superior Court), to-wit:

1. Summons and Complaint with proof of service.
2. Motion for restraining order and order to show cause.
3. Restraining order and Order to Show Cause.

[fol. 133] 4. Restraining Order Bond.

5. Stipulation for Extension of Restraining Order.
6. Order extending Restraining Order.
7. Stipulation and Order modifying Restraining Order.
8. Stipulation and Order of Intervention.
9. Demurrer to Complaint by Intervenors, J. T. S. Lyle, Dix Rowland, Charles Heath, T. H. Bowden and H. E. Davenport, Individually and as Trustees.
10. Demurrer to Complaint by Defendants, Richland Irrigation District, an irrigation district, C. J. Barnett, W. A. Stockman and W. C. McInnis, Directors of the Richland Irrigation District.
11. Demurrer to Complaint by Defendants, B. J. Pacius, Ira C. Hawley and H. S. Hughes, County Commissioners of Benton County, Washington, and Harry Forsyth, Treasurer of Benton County, Washington.
12. Opinion of the Trial Court, letter dated the 11th day of September, 1931.
13. Order sustaining Demurrers and Judgment of Superior Court dismissing cause and taxing costs.
14. Notice of Appeal.
15. Order fixing amount of bond on appeal.

16. Injunction and cost bond on appeal.

17. (Excerpts from printed reply brief of Appellant—Pages 1 & 2) "One question only is presented for consideration by the record in this case, to-wit: Has an irrigation district the power to levy assessments against the property of an individual landowner in an amount in substantial excess of the total benefits conferred upon his land by the improvement for the cost of which the assessments are levied? "It is the contention of the Appellant that such a levy constitutes a taking of property without due process of law and is therefore in violation of the Fourteenth Amendment of the constitution of the United States."

17-a. Order for Hearing En Banc.

18. Opinion of the Supreme Court of the State of Washington, dated the 8th day of August, 1932.

19. Petition for re-hearing.

20. Order denying Petition for re-hearing in the Supreme Court of the State of Washington, dated September 28th, [fol. 134] 1932.

21. Judgment of the Supreme Court of the State of Washington, entered September 28th, 1932.

22. Remittitur.

23. Certificate of the Chief Justice of the Supreme Court of the State of Washington, re finality of judgment herein.

24. Certificate of the Chief Justice of the Supreme Court of the State of Washington, re consideration by the Supreme Court of the State of Washington of Federal Constitutional question.

25. Petition for Order Granting Appeal, Assignments of Error, and Prayer for Reversal (Original), and Proof of Service thereof. (Original)

26. Order Granting Appeal (Original) and Proof of Service thereof. (Original)

27. Statement as to Jurisdiction of the Supreme Court of the United States required by Rule 12 (1) of that Court (Original), and Proof of Service thereof. (Original)

28. Statement directing attention to provisions of Paragraph 12 (3) of the rules of the Supreme Court of the United States, as required by Paragraph 2 of said rules, and Proof of Service thereof. (Original)

29. Cost and Supersedeas Bond, and approval thereof. (Original)

30. Order approving Cost and Supersedeas Bond (Original), and Proof of Service thereof (Original).

31. Citation of Appeal, with Proof of Service thereof (Original).

32. This Præcipe with Proof of Service thereof (Original).

Said transcript to be prepared as required by law, and the rules of the Supreme Court of the State of Washington and the Supreme Court of the United States, and to be filed in the Office of the Clerk of the Supreme Court of the United States, in the City of Washington, District of Columbia, for use on appeal herein.

Dated at Seattle, Washington, this 17 day of October, 1932.

Charles H. Farrell, Venables, Graham & Howe, Albert Olsen, Attorneys for Appellant.

[fol. 135] We hereby acknowledge service of the foregoing Præcipe for Transcript of Record, and the receipt of true copies thereof, this 18 day of October, 1932.

Preston, Thorgrimson & Turner, Attorneys for J. T. S. Lyle, Dix Rowland, Charles Heath, T. H. Bowden, and H. E. Davenport, Individually and as Trustees, Intervenors and Appellees.

This 17th day of October, 1932.

M. M. Moulton, Attorney for Richland Irrigation District, an Irrigation District; C. J. Barnett, W. A. Stockman, and W. C. McInnis, Directors of Richland Irrigation District, and Irrigation District, Defendants and Appellees. Charles L. Powell, Attorney for B. J. Pacius, Ira C. Hawley, and H. S. Hughes, County Commissioners of Benton County, Washington, and Harry Forsyth, Treasurer of Benton County, Washington, Defendants and Appellees.

[fol. 136] IN SUPREME COURT OF WASHINGTON

EXCERPTS FROM BRIEFS REQUESTED BY PRÆCIPE FOR ADDITIONAL TRANSCRIPT OF RECORD

1. Extract from appellant's brief, p. 94, as follows:

"No question is raised as to the legality of the formation of this district or of the inclusion of all lands within the district, or as to the fact that the aggregate benefits equalled the bonded debt, nor were these questions raised by the issues in the Hartung case. The question that is raised now is this:

Assuming the legal organization of an irrigation district after notice and hearing upon the question of organization, boundaries, inclusions of land to be benefited and total amount of benefits to all the lands within the district, is the individual landowner entitled to another hearing after due notice for the purpose of allocating to his land its just proportion of the benefits, and does the benefit thus allocated limit his liability to pay?"

2. Extract from p. 7 of respondents' irrigation district brief, as follows:

"This district contained approximately 10,000 acres. The bonded indebtedness is $538,000. Under the rule announced in the Hartung case it is conclusively presumed that the benefits aggregate at least $538,000. Following the presumption and the law it became the duty of the directors to apportion the aggregate bonded indebtedness against all the land according to their respective benefits. Let us assume that this was done and that against each tract of land in the district was lodged its proper proportion of the indebtedness. In the aggregate that would have equal-ed the indebtedness."

3. Extracts from interveners' brief herein, as follows: pp. 30 to 35, inclusive:

"Plaintiff alleges in his complaint that the full amount of the money procured from the bond issue was expended in the construction of the improvements. The complaint does not allege, nor does counsel contend, that the total amount of the benefits do not equal the amount of the bond

issue. Appellant does not contend that as between him and other privately owned land his land is disproportionately assessed. Appellant only alleges that his land is assessed more than the total benefits, and by benefits he evidently refers to the benefits arising from the physical improvement itself, and not the added benefit accruing to the district as a whole and to each land owner individually by virtue of the acquisition of lands by the district for unpaid assessments and the unpaid assessments on the other lands themselves, both of which elements form the basis for the secondary liability referred to in the Hartung case and in the following cases cited in our brief in that case.

[fol. 137] Cosman v. Chestnut Valley Irrigation District, 238 Pac. 879 (Mont.) 40 A. L. R. 1344, 1378, 1349;

Stevens v. Melville, 175 Pac. (Utah) 602, 605;

Morris v. Montezuma Irrigation District, 248 Fed. 369;

Orr v. Allen, 245 Fed. 486, approved in Kadow v. Paul, 134 Wash. 553.

If he is correct as to his land then it necessarily follows that as no claim is made that his land has been assessed disproportionately, that all the land in the district has already been assessed for more than maximum benefits received, and the net result is that no part of the entire principal of $538,000 of such bonds can be collected.

"On page 94 of the appellant's brief counsel says:

'No question is raised as to the legality of the formation of this district or of the inclusion of all lands within the district, or as to the fact that the aggregate benefits equalled the bonded debt, nor were these questions raised by the issues in the Hartung case. The question that is raised now is this:

'Assuming the legal organization of an irrigation district after notice and hearing upon the question of organization, boundaries, inclusions of land to be benefited and total amount of benefits to all the lands within the district, is the individual landowner entitled to another hearing after due notice for the purpose of allocating to his land its just proportion of the benefits, and does the benefit thus allocated limit his liability to pay?'

"Counsel then contends upon page 95 that this adjudication of the total benefits is not an adjudication and allocation of individual benefits, and from this proposition counsel argues that the decisions above cited are unsound. We cannot agree with counsel. The decisions of this court do not deny the right of a landowner to a hearing upon the amount of his assessment. But the adjudication of the total benefits would amount to nothing and be wholly worthless if it were not to be used as a basis for the subsequent assessments. If the position taken by counsel in this case were sustained the adjudication of total benefits would have no force whatever. Each landowner could come in, and disregarding the adjudication of total benefits, litigate anew the amount of benefit to his land as a new proposition, and ultimately the courts might hold upon such new litigation that the total benefits as adjudged in the many separate landowners' cases amount to but a small part of the total benefits fixed by the adjudication for the bond issue. There is only one way to give force to this first adjudication of total benefits and that is in any attack upon the assessment by a landowner to start as a foundation with the proposition that the total benefits equal the bond issue. This leaves open only one question, and that is as to whether or not the assessments made are proper- [fol. 138] tionate as between the private land owners. If they are proportionate then their aggregate must equal the total amount of the bond issue. If not, the adjudication as to total benefits amounts to nothing. It is therefore necessary for a plaintiff attacking his assessment to allege that his assessment is disproportionate as between his land and other privately owned lands, unless, of course, his allegations show that the total assessments exceed the total bond issue.

"All the assessments heretofore paid by appellant have been for interest on the bonds. Our contention in our brief in the Hartung case was that interest is not to be included in the computation of maximum assessments supported by the benefit conferred by the original improvement, but it supported by the added benefit of the extension of time allowed for payment of the original cost. This contention was sustained by the supreme court, and the provisions of the irrigation law providing assessments for interest held valid, though without discussing the reasons urged in its support."

P. 36:

"If the contention of appellant here is sustained no part of the principal of the bonds in the Richland Irrigation District will ever be paid. All owners will claim that they have paid enough interest to equal their total benefits, and the court will under the authority of this case, if appellant wins, enjoin all further assessments against those lands."

4. Extract from pp. 41, 42 and 43 of appellant's reply brief, as follows:

"It is true as counsel suggest, that we have not contended that our land is disproportionately assessed. For the purpose of discussion let us assume that the assessment is levied in proportion to the benefits to each individual tract as determined by the judgment of the Board. We do not question the right of the Board to levy an assessment so determined so long as the aggregate of the successive assessments do not substantially exceed the total amount of our maxiumu- benefit. It is true that we only allege that our land is assessed more than the total benefits. That is the whole question in this case. Does the Board have the right to levy successive assessments in excess of our total benefits? This is the question to the consideration of which we devoted 112 pages of our opening brief. This is the question which counsel declined to discuss upon its merits. It is the only question in the case. The fact that the assessments are levied proportionately does not make them legal if the total amount of them exceeds the benefits. There are two (2) requirements for a legal assessment: (a) uniformity as to all parts of the assessment district; and (b) limitation of the total assessments against a specific tract to the amount of the total benefits conferred thereon."

[fols. 139-142] In Supreme Court of Washington

[Title omitted]

Præcipe for Additional Transcript of Record

To the Clerk of the Supreme Court of the State of Washington:

Please prepare, as an addition to the transcript of record in the above entitled cause to be filed in the office of the

clerk of the Supreme Court of the United States, the following portion of the record in the above entitled cause not included in the præcipe for transcript made by the appellant:

Excerpts from briefs omitted here; printed side page 136 ante.

[fols. 143-153] Preston, Thorgrimson & Turner, Attorneys for Interveners and Appellees.

We hereby acknowledge service of the foregoing Præcipe for additional transcript of record, and the receipt of true copies thereof, this 26 day of October, 1932.

Venables, Graham & Howe, Albert Olsen, Attorneys for Appellant. —— ——, Attorney for Richland Irrigation District, an Irrigation District; C. J. Barnett, W. A. Stockman, and W. C. McInnis, Directors of Richland Irrigation District, an Irrigation District, Defendants and Appellees. —— ——, Attorney for B. J. Pacius, Ira C. Hawley, and H. S. Hughes, County Commissioners of Benton County, Washington, and Harry Forsyth, Treasurer of Benton County, Washington, Defendants and Appellees.

[fol. 154] In Supreme Court of the United States

Appellant's Statement of Points to be Relied Upon and Designation of Parts of the Record to be Printed—Filed Nov. 19, 1932

Comes now the Appellant, J. T. Roberts, and states that he adopts his Assignments of Error as his Statement of Points to be Relied Upon in this case.

And said Appellant, J. T. Roberts, further states that only the following parts of the record, as filed in the above entitled Court, need be printed by the Clerk of said Court for the consideration of this case:

[fol. 155]	Title of paper	Record page
1.	Complaint	1
2.	Restraining Order and Order to Show Cause	13
3.	Restraining Order Bond	15
4.	Stipulation for Order Modifying Restraining Order	21
5.	Order Modifying Restraining Order	25
6.	Stipulation for Order allowing Intervention	27
7.	Order allowing Intervention	28
8.	Demurrer to Complaint by Interveners, J. T. S. Lyle, Dix Rowland, Charles Heath, T. H. Bowden and H. E. Davenport, Individually and as Trustees	29
9.	Demurrer to Complaint by Defendants, Richland Irrigation District, an irrigation district, C. J. Barnett, W. A. Stockman and W. C. McInnis, Directors of the Richland Irrigation District, an irrigation district	30
10.	Demurrer to Complaint by Defendants, B. J. Pacius, Ira C. Hawley and H. S. Hughes, County Commissioners of Benton County, Washington, and Harry Forsyth, Treasurer of Benton County, Washington	31
11.	Opinion of the Trial Court, letter dated the 19th day of June, 1931	32
12.	Order Sustaining Demurrers and Judgment of Superior Court dismissing Complaint and taxing costs	33
13.	Notice of Appeal	35
14.	Order Fixing Amount of Bond on Appeal	37
15.	Injunction and Cost Bond on Appeal	38
16.	(Excerpts from printed reply brief of Appellant—Pages 1 & 2:) "One question only is presented for consideration by the record in this case, to-wit: Has an irrigation district the power to levy assessments against the property of an individual landowner in an amount in substantial excess of the total benefits conferred upon his land by the improvement for the cost of which the assessments are levied? It is the contention of the Appellant that such a levy constitutes a taking [fol. 156] of property without due process of	

Title of paper	Record page
law and is therefore in violation of the Fourteenth Amendment of the Constitution of the United States"	40
17. Order for Hearing En Banc	41
18. Opinion of the Supreme Court of the State of Washington, filed the 8th day of August, 1932	42
19. Order denying Petition for Rehearing in the Supreme Court of the State of Washington, signed and filed September 28, 1932	66
20. Judgment of the Supreme Court of the State of Washington entered September 28, 1932	67
21. Petition for Order Allowing Appeal, Assignments of Error, and Prayer for Reversal	68
22. Proof of Service of Petition for Order Allowing Appeal, Assignments of Error and Prayer for Reversal	71, 73, 75
23. Order Allowing Appeal	77
24. Proof of Service of Order Allowing Appeal	79, 81, 83
25. Certificate of the Chief Justice of the Supreme Court of the State of Washington re Finality of Judgment	85
26. Proof of Service of Certificate of the Chief Justice of the Supreme Court of the State of Washington re Finality of Judgment	86
27. Certificate of the Chief Justice of the Supreme Court of the State of Washington re Consideration of Federal Constitutional Question	87
28. Proof of Service of Certificate of the Chief Justice of the Supreme Court of the State of Washington re Consideration of Federal Constitutional Question	88
29. Statement as to Jurisdiction	89
30. Proof of Service of Statement as to Jurisdiction	113, 115, 117
31. Statement Required by Paragraph 2 of Rule 12 of the Revised Rules of the Supreme Court of the United States	119
32. Proof of Service of Statement Required by Paragraph 2 of Rule 12 of the Revised Rules of the Supreme Court of the United [fol. 157] States	120
33. Appeal and Supersedeas Bond	121

Title of paper	Record page
34. Order Approving Bond	123
35. Proof of Service of Order Approving Bond	124, 126, 128
36. Citation of Appeal	130
37. Proof of Service of Citation of Appeal	131
38. Præcipe for Transcript of Record	132
39. Proof of Service of Præcipe for Transcript of Record	135

Dated this 14 day of November, 1932.

Charles H. Farrell, Venables, Graham & Howe, Albert Olsen, Attorneys for Appellant J. T. Roberts.

[fol. 158] We hereby acknowledge service of the foregoing appellant's statement of points to be relied upon and designation of parts of the record to be printed, and the receipt of a true copy thereof this 14 day of November, 1932.

Preston, Thorgrimson & Turner, Attorneys for J. T. S. Lyle, Dix Rowland, Charles Heath, T. H. Bowden, and H. E. Davenport, Individually and as Trustees, Interveners and Appellees.

This 14 day of November, 1932.

M. M. Moulton, Attorney for Richland Irrigation District, an Irrigation District; C. J. Barnett, W. A. Stockman, and W. C. McInnis, Directors of Richland Irrigation District, an Irrigation District, Defendants and Appellees. Charles L. Powell, Attorney for B. J. Pacius, Ira C. Hawley, and H. S. Hughes, County Commissioners of Benton County, Washington, and Harry Forsyth, Treasurer of Benton County, Washington, Defendants and Appellees.

[fol. 158½] [File endorsement omitted.]

[fol. 159] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1932

APPELLEES' DESIGNATION OF ADDITIONAL PARTS OF RECORD TO BE PRINTED—Filed Nov. 19, 1932

Come now the above named interveners, appellees herein, and designate as matter which they think material the following additional parts of the record to be printed by the clerk of the above entitled court:

1. Excerpts from briefs requested by præcipe for additional transcript of the record (Tr. pp. 136 to 138, inc.).

2. Such part of the præcipe for additional transcript of the record (Tr. 139) as shows that appellees requested that there be included in the record the foregoing excerpts from briefs.

3. Statement against jurisdiction (Tr. 144).

[fol. 160] Dated this 14th day of November, 1932.

Harold Preston, O. D. Thorgrimson, L. T. Turner,
Preston, Thorgrimson & Turner, Attorneys for Appellees.

Received copy of foregoing statement of additional matter to be printed this 14th day of November, 1932.

Venables, Graham & Howe, Attorneys for Appellant.
Albert Olsen, Charles H. Farrell.

[fol. 161] [File endorsement omitted.]

Endorsed on cover: File No. 37,213. Washington Supreme Court. Term No. 516. J. T. Roberts, appellant, vs. Richland Irrigation District et al., etc. Filed November 19, 1932. File No. 37,213.

INDEX.

Subject Index.

	Page
Opinions below	2
Jurisdiction	2
1. Appeal timely taken	2
2. Finality of judgment	3
3. Judgment of the highest court	3
4. Validity of a state statute drawn into question and decision in favor of its validity	4
(*a*) The statute	4
(*b*) Application of statute or nature of the case	12
(*c*) Constitutional question timely raised	16
(*d*) Constitutional question sufficiently raised	17
i. Pleadings and opinion	17
ii. Decisions cited in opinion of State Supreme Court	18
iii. Certificate of the Chief Justice of the Supreme Court of the State of Washington, re consideration of the Federal question	19
iv. Briefs	20
5. Extent of this Court's jurisdiction	21
(*a*) Application of statute without due process of law.	21

Authorities Cited.

Cases.

Board of Commissioners of Tippecanoe County v. Lucas, Treasurer, 93 U. S. 108, 113, 114	3
Cissna v. State of Tennessee, 246 U. S. 289, 293	16, 17
Dahnke-Walker Milling Company v. Bondurant, 257 U. S. 282, 288	22
Dibble v. Bellingham Bay Land Company, 163 U. S. 63, 69-70	19
Fallbrook Irrigation District v. Bradley, 164 U. S. 112	19, 21, 23
Fiske v. Kansas, 274 U. S. 380, 385	22
Hagar v. Reclamation District No. 108, 111 U. S. 701	24
Home Insurance Company et al., v. Dick, et al., 281 U. S. 397, 407	16
Illinois Central Railroad Company v. McKendree, 203 U. S. 514, 524	20
Kadow et al. v. Paul et al. Commissioners, 274 U. S. 175	19, 24

Page

Live Oak Water Users' Association, et al., v. Railroad Commission of California, et al., 269 U. S. 354, 358 21
Mallinckrodt Chemical Works v. State of Missouri, ex rel Jones, 238 U. S. 41, 49 16
Marvin v. Trout, 199 U. S. 212, 223 19
Mower v. Fletcher, 114 U. S. 127 3
New York ex rel Bryant v. Zimmerman, et al, 278 U. S. 63, 67-69 ..... 17, 18, 21
Norwood v. Baker, 172 U. S. 269 22
Rector v. City Deposit Bank Company, 200 U. S. 405, 412 19
Roberts v. Richland Irrigation District, et al., 69 Wash. Decisions, No. 3, page 108; 13 Pac. 2-437 ..... 1, 12, 15, 18, 19
Saltonstall, et al., v. Saltonstall, et al., Trustees, 276 U. S. 260, 267 17
Silver v. Silver, 280 U. S. 117, 122 16
State ex rel. Clancy v. Columbia Irrigation District of Stevens County, 121 Wash. 79, 208 Pac. 27 15
State ex rel Wells, v. Hartung, et al., 150 Wash. 590, 274 Pac. 181 ..... 15, 18, 19
Tregea v. Modesto Irrigation District, 164 U. S. 179, 181 21
Wecker v. National Enameling and Stamping Company, 204 U. S. 176, 182 3

STATUTE

Section 237 (*a*) of the U. S. Judicial Code as amended by the Acts of February 13th, 1925, January 31st, 1928, and April 26th, 1928; Title 28 U. S. C., Sections 344 (*a*), 861 (*b*) 2
Remington's Compiled Statutes of Washington 1922, Vol. I., Section 1716, pages 906 and 907; Section 1737, pages 924 and 925; Section 1740, pages 925 and 826; Section 1741, page 926 4
Sections 7417-7505, inclusive, pages 1710 to 1761, inclusive, Remington's Compiled Statutes of Washington 1922, Volume II, Title XLVIII, Chapter IV, and as amended by Sections 7417 to 7505-5, inclusive, pages 973 to 999, inclusive, Remington's Compiled Statutes of Washington 1927 Supplement, Title XLVIII, Chapter IV, and as amended by Chapter 181 of the Session Laws of the State of Washington for 1929, Sections 1 to 3, inclusive, pages 469 to 474, inclusive, and by Chapter 185 of the Session Laws of the State of Washington for 1929, Sections 1 to 4, inclusive, pages 478 to 487, inclusive 5

CONSTITUTIONS

Page

Constitution of the State of Washington, Article IV, Sections 1, 4 and 6, found in Remington's Compiled Statutes of the State of Washington, 1922, Volume 1, pages 75, 77 and 79 respectively 4

TEXTS.

5 McQuillan on Municipal Corporations, Section 2018, 1913 Edition 24

1 Page and Jones on Taxation by Assessment, Section 118, page 197, 1909 Edition 24

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 516

J. T. ROBERTS, APPELLANT,

vs.

RICHLAND IRRIGATION DISTRICT, AN IRRIGATION DISTRICT; C. J. BARNETT, W. A. STOCKMAN, AND W. C. McINNIS, DIRECTORS OF THE RICHLAND IRRIGATION DISTRICT, AN IRRIGATION DISTRICT, AND HARRY FORSYTH, TREASURER OF BENTON COUNTY, WASHINGTON; B. J. PACIUS, IRA C. HAWLEY, AND H. S. HUGHES, COUNTY COMMISSIONERS OF BENTON COUNTY, WASHINGTON, DEFENDANTS; J. T. S. LYLE, DIX ROWLAND, CHARLES HEATH, T. H. BOWDEN, AND H. E. DAVENPORT, INDIVIDUALLY AND AS TRUSTEES, INTERVENERS, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

Pursuant to Rule 12 (1) of the Rules of this Court, Appellant submits this statement showing that the

appeal in the above entitled cause is properly before this Court.

OPINIONS BELOW.

The opinion of the trial court, in a letter addressed to Counsel, unpublished, appears in the record on file in the Supreme Court of the State of Washington. (R. 32.) The opinion of the Supreme Court of the State of Washington, reported at this time in the Advance Sheets, Washington Decisions, Vol. 69, No. 3, published at Olympia, Washington, on August 17, 1932, at Page 108, and in 13 Pac. (2d) 437, was filed on the 8th day of August, 1932. (R. 42.) Petition for rehearing was filed by Appellant on the 30th day of August, 1932. (R. 48.) Petition for rehearing was denied on the 28th day of September, 1932. (R. 66.) Judgment was entered on the 28th day of September, 1932. (R. 67.) Remittitur was issued on the 28th day of September, 1932. (R. 67.)

JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 (a) of the U. S. Judicial Code, as amended by the Acts of February 13, 1925, January 31, 1928, and April 26, 1928; Title 28 U. S. C., Sections 344 (a), 861 (a) and 861 (b).

(1)

Appeal Timely Taken.

The judgment of the Supreme Court of the State of Washington sought to be reversed was entered on the 28th day of September, 1932. (R. 67.) A petition

for appeal, accompanied by Assignments of Error and Statement as to Jurisdiction required by Rule 12 (1) of the Supreme Court of the United States, was on the 15th day of October, 1932, presented to the Honorable Warren W. Tolman, Chief Justice of the Supreme Court of the State of Washington, (R. 68.) and by him allowed on the 15th day of October, 1932. (R. 77.)

(2)

Finality of Judgment.

The judgment forming the basis of the appeal is a final judgment in the sense that an affirmance of it would leave nothing to be done by the Court below but to execute the judgment already rendered.

It is one dismissing Plaintiff Appellant's Complaint and awarding costs against him. It was entered after the Court had sustained demurrers of all adverse parties to the Complaint and after the Plaintiff Appellant had elected to stand upon his Complaint and refused to plead further. On its face it is final in form as well as in substance, and disposes of all elements of controversy.

Mower v. *Fletcher*, 114 U. S. 127;

Board of Commissioners of Tippecanoe County, v. *Lucas, Treasurer*, 93 U. S. 108, 113, 114;

Wecker v. *National Enameling and Stamping Company*, 204 U. S. 176, 182.

(3)

Judgment of the Highest Court.

The judgment of the Supreme Court of the State Washington is that of the highest Court in which,

under the laws of the State, such judgment could be had. No further appeal may be had to it or any other Court, save the Supreme Court of the United States, hence the appeal herein is taken from "a highest court of a State in which a decision in the suit could be had."

Constitution of the State of Washington, Article IV., Sections 1, 4 and 6, found in Remington's Compiled Statutes of the State of Washington, 1922, Volume 1, pages 75, 77 and 79 respectively.

Remington's Compiled Statutes of Washington, 1922, Vol. I, Section 1716, pages 906 and 907; Section 1737, pages 924 and 925; Section 1740, pages 925 and 926; and Section 1741, page 926.

Certificate of the Chief Justice of the Supreme Court of the State of Washington, re Finality of Judgment. (R. 85.)

(4)

Validity of a State Statute Drawn Into Question and Decision in Favor of Its Validity.

In this suit Appellant contended in the Court below that a State statute, as applied, was repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States, and the decision of he court below was in favor of the validity of the State statute.

(*a*) *The Statute.*

The statute, the validity of which was drawn into question, is the Irrigation District Law of the State

of Washington embodied in Sections 7417-7505, inclusive, pages 1710 to 1761, inclusive, Remington's Compiled Statutes of Washington, 1922, Volume II, Title XLVIII, Chapter IV, as amended by Sections 7417 to 7505-5, inclusive, pages 973 to 999, inclusive, Remington's Compiled Statutes of Washington, 1927 Supplement, Title XLVIII, Chapter IV, and as amended by Chapter 181 of the Session Laws of the State of Washington for 1929, Sections 1 to 3, inclusive, pages 469 to 474, inclusive, and by Chapter 185 of the Session Laws of the State of Washington for 1929, Sections 1 to 4, inclusive, pages 478 to 487, inclusive, pertinent provisions of which are summarized as follows:

Section 7417 of Remington's Compiled Statutes of Washington, 1922, page 1710, as amended by Section 7417, page 973, of Remington's Compiled Statutes of Washington, 1927 Supplement, provides that whenever a majority of the holders of title to lands susceptible of "irrigation" desire to provide construction of works for the irrigation of the same, they may propose the organization of an irrigation district, and when so organized such district shall have the powers conferred by law.

Sections 7417-1 and 7417-2, pages 973 and 974, Remington's Compiled Statutes of Washington, 1927 Supplement, set forth the purposes and powers of such an irrigation district, to-wit:

> (*a*) The construction or purchase of works, or parts of same, for the irrigation of lands within the operation of the district.

(*b*) The reconstruction, repair or improvement of existing irrigation works.

(*c*) The operation or maintenance of existing irrigation works.

(*d*) The construction, reconstruction, repair or maintenance of a system of diverting conduits from a natural source of water supply to the point of individual distribution for irrigation purposes.

(*e*) The execution and performance of any contract authorized by law with any department of the Federal Government or of the State of Washington, for reclamation and irrigation purposes.

(*f*) The performance of all things necessary to enable the district to exercise the powers herein granted.

(*g*) To purchase, and sell electric power to the inhabitants of the irrigation district for the purposes of irrigation and domestic use.

(*h*) To construct, repair, purchase, maintain or lease a system for the sale or lease of water to the owners of irrigated lands within the district for domestic purposes.

(*i*) To construct, repair, operate and maintain a system of drains, as herein provided.

(*j*) To assume, as principal or guarantor, any indebtedness to the United States under the Federal reclamation laws, on account of district lands.

Sections 7418 and 7419, pages 1710 to 1714, inclusive, of Remington's Compiled Statutes of Washington,

1922, as amended by Sections 7418 and 7419, pages 974 to 977, inclusive, of Remington's Compiled Statutes of the State of Washington, 1927 Supplement, and Sections 7420 to 7427, inclusive, pages 1714 to 1719, inclusive, Remington's Compiled Statutes of Washington, 1922, prescribe the steps to be taken to form an irrigation district, including the election of a board of directors.

Section 7428, page 1719, Section 7429, page 1720, Section 7430, page 1722, and Section 7431, page 1723, of Remington's Compiled Statutes of Washington, 1922, and Sections 7428-1, 7428-2, 7428-3, page 978, and Section 7429-1, page 979, and Sections 7431 1/2, 7431 1/2-1, 7431 1/2-2, 7431 1/2-3, 7431 1/2-4, 7431 1/2-5, 7431 1/2-6, pages 979 and 980, of Remington's Compiled Statutes of Washington, 1927 Supplement, describe and set forth the powers and duties of said board of directors.

Section 7433, page 1726, Section 7434, page 1726, and Section 7435, page 1727, of Remington's Compiled Statutes of Washington, 1922, and Section 7432, page 1723, of Remington's Compiled Statutes of Washington, 1922, as amended by Section 7432, page 981, of Remington's Compiled Statutes of Washington, 1927 Supplement, and Sections 7432-1 to 7432-14, inclusive, pages 984 to 987, inclusive, and Sections 7434-1 to 7434-7, inclusive, pages 988 and 989, of Remington's Compiled Statutes of Washington, 1927 Supplement, authorize the districts to issue and sell bonds for the purposes therein mentioned, and prescribe the necessary steps therefor, the necessary investigations prior

to the sale of said bonds, and the conditions and terms of said bonds.

Section 7434, page 1726, of Remington's Compiled Statutes of Washington, 1922, provides:

> "Said bonds and interest thereon * * * shall be paid by revenue derived from an annual assessment upon the real property of the district, *and all the real property in the district shall be and remain liable to be assessed for such payments until fully paid as hereinafter provided.*" (Italics ours.)

This section also provides for a lien upon the property of a district in favor of said bonds and gives a right of foreclosure thereof.

Section 7436, pages 1727 and 1728, Remington's Compiled Statutes of Washington, 1922, provides as follows:

> "Assessments made in order to carry out the purpose of this act shall be made in proportion to the benefits accruing to the lands assessed and equitable credit shall be given to the lands having a partial or full water right. * * * The secretary must, between the first Monday in March and the first Tuesday in September in each year * * * prepare an assessment-roll with appropriate headings in which must be listed all the lands within the district. In such book must be specified, in separate columns, under the appropriate headings:
>
> "First, the name of the person to whom the property is assessed. * * *
>
> "Second, land by township, * * * giving an estimate of the number of acres. * * *

> "Third, in further columns with appropriate headings shall be specified the ratio of benefits, or, when deemed by the secretary more practicable, the per acre value, or the amount of benefits, for general and special district and local improvement district purposes, and the total amount assessed against each tract of land."

Section 7438, pages 1728-1729, Remington's Compiled Statutes of Washington, 1922, provides that before the first Tuesday in November in each year the secretary must complete his assessment-roll and deliver it to the board, which shall give notice thereof, and of the time the board, acting as a board of equalization, will meet to equalize assessments.

Section 7439, page 1729, Remington's Compiled Statutes of Washington, 1922, requires the Board "to hear and determine such objections to the said assessment-roll as may come before them; and the board may change the same as may be just."

Chapter 185, Section 1, pages 478 to 482, inclusive, of the Session Laws of 1929 of the State of Washington, which amends Section 7440, page 990, of Remington's Compiled Statutes of Washington, 1927 Supplement, which amends Section 7440, page 1729, of Remington's Compiled Statutes of Washington, 1922, provides that:

> "The board of directors shall in each year * * * levy an assessment sufficient to raise the ensuing annual interest on the outstanding bonds, * * *"

and

"Beginning in the year preceding the maturity of the first series of the bonds of any issue, the board must from year to year increase said assessment for the ensuing years in an amount sufficient to pay and discharge the outstanding bonds as they mature. * * * *The board shall also at the time of making the annual levy, estimate the amount of all probable delinquencies on said levy and shall thereupon levy a sufficient amount to cover the same and a further amount sufficient to cover any deficit that may have resulted from delinquent assessments for any preceding year.* * * *

"If the annual assessment roll of any district has not been delivered to the county treasurer * * * or if said roll when delivered is not equalized and the required assessments levied as required by law, or if for any reason the required assessment or levy has not been made, the county treasurer shall immediately notify the board of county commissioners of the county in which the office of the board of directors is situated, and said board of county commissioners shall cause an assessment roll for the said district to be prepared and shall equalize the same if necessary and make the levy required by this chapter in the same manner and with like effect as if the same had been equalized and made by the said board of directors, and all expenses incident thereto shall be borne by the district. * * *

"At the time of making the annual levy in the year preceding the final maturity of any issue of district bonds, the board of directors shall levy a sufficient amount to pay and redeem

all bonds of said issue then remaining unpaid. * * *." (Italics ours.)

Section 7441, pages 1730 and 1731, Remington's Compiled Statutes of Washington, 1922, provides that the assessment upon real property shall be a lien against the property assessed.

Section 7442, pages 1731 and 1732, Remington's Compiled Statutes of Washington, 1922, as amended by Chapter 181 of the Session Laws of 1929 of the State of Washington, Section 1, pages 469 to 472, inclusive, and Sections 7442-1 and 7442-2, pages 992 and 993, Remington's Compiled Statutes of Washington, 1927 Supplement, provide for the collection of the assessment.

Sections 7443 to 7445, inclusive, pages 1732 to 1735, inclusive, Remington's Compiled Statutes of Washington, 1922, as amended by Chapter 181 of the Session Laws of 1929 of the State of Washington, Sections 2 and 3, pages 472 to 474, inclusive, provide for the sale of property for delinquent assessments, including a provision that if there is no purchaser in good faith when the property is offered for sale a second time, the whole amount of the property assessed shall be struck off to the irrigation district as the purchaser, and the district is thereupon endowed with the same rights in said property as a private purchaser, and may, if said property is not redeemed, sell it at its *reasonable market value.*

The remaining sections of the statute, not heretofore referred to, deal with administrative and operative problems not involved in this appeal.

(*b*) *Application of the Statute or Nature of the Case.*

The validity of the above statute is questioned as applied to the facts as alleged in the complaint and epitomized by the Supreme Court of the State of Washington in its opinion. 69 Wash. Decisions, No. 3, pages 108, 109; 13 Pac. (2d) 437, 438. (R. 42.)

> "J. T. Roberts * * * brought this action to enjoin the Richland Irrigation District * * * from levying * * * any assessment for the payment of the interest or the principal of the district's bonds (which were issued to pay for district improvements)
>
> > "'* * * against any particular tract of land within said district which will require the payment by the owner of said land of an amount in excess of the special benefit actually accruing to each particular tract of land by reason of the acquiring of water rights and making of improvements by the district, and the issuance of bonds as hereinabove referred to.'
>
> "The interveners (certain owners and holders of bonds issued by the district), who appeared individually and as trustees, and the defendants interposed demurrers, which were sustained. The appeal is from the judgment of dismissal rendered upon the plaintiff's refusal to plead further.
>
> "The allegations of the complaint are, substantially, as follows: Appellant is the owner of forty acres of land in the Richland Irrigation District. That district was legally established

and its organization approved and confirmed judicially in 1919. Thereafter, pursuant to statutory requirements, the district issued bonds in the sum of $538,000, the proceeds from the sale of which were used to purchase additional water rights and to pay the cost of improvements essential to the irrigation of the lands within the district. The bonds bear interest at the rate of six per centum per annum payable semi annually.

"By reason of the improvements made by the district the thirty five irrigable acres of appellant's forty-acre tract were benefited ten dollars an acre; that is, total benefits of three hundred and fifty dollars accrued to appellant's forty-acre tract by reason of the improvements made by the district. The ultimate amount of the liability of the appellant's land for assessments for bond purposes during the ten-year maturing period of the bonds is five hundred and sixty dollars (three hundred and fifty dollars plus interest of six per centum per annum for ten years). For the years 1920 to 1929, inclusive, appellant paid an aggregate of $1,168.65 in assessments against his forty acres for the payment of interest and principal of the bonds described above.

"The directors of the district have made all preparations for, and are threatening to levy for the year 1930 an assessment of $757.53 against the lands of the appellant for the purpose of meeting interest and principal on the bonds. No part of the levy is made on account of, or with reference to, any special benefit accruing to the real property of the appellant. The assessment was levied for the purpose of creating a fund to take up or eliminate the

deficiencies in the bond interest and bond retirement funds.

> "'* * * due wholly or in part to a failure of certain landowners within the district to pay assessments which have heretofore or will hereafter be levied against lands in said district to such other persons.'

"The directors of the district informed the appellant that it is their fixed policy and that they propose to

> "'* * * assess and re-assess all delinquencies which have heretofore or may hereafter accrue against the lands of this plaintiff and other lands in the district which continue to pay their assessments, without delinquency, until the lands of this plaintiff, and the lands of other persons who have and who shall hereafter pay the assessments levied will create a fund sufficient to pay the entire outstanding indebtedness, and retire said bonds, both principal and interest, and that they propose to make such assessments without reference to the special benefits which have accrued to the real property of this plaintiff and any other landowners in the district who may continue to pay their assessments, but to be governed and determined in making said assessments solely by a consideration of the amount of money required to pay said indebtedness. * * *'"

Paragraph VIII of the complaint (R. 4) contains the specific allegation, admitted by the demurrers of the Appellees herein:

> "That no other benefits of any description accrued to this Plaintiff or to the lands owned by him by reason of the acquirement of said additional water rights, the making of said improvements, or the expenditure of any funds by said district in excess of the sum of $350."

The question raised by these admitted facts is:

> Does a State Statute, which, as construed and applied, authorizes the levy, by an irrigation district, of local improvement assessments substantially in excess of and wholly without reference to the benefits accruing to the land so assessed, transgress the due process clause of the Fourteenth Amendment to the Constitution of the United States?

The Supreme Court of the State of Washington has construed the Statute to expressly authorize such an assessment.

State ex rel. Clancy, v. *Columbia Irrigation District of Stevens County*, 121 Wash. 79, 208 Pac. 27;

State ex rel. Wells, v. *Hartung et al.*, 150 Wash. 590, 274 Pac. 181;

Roberts v. *Richland Irrigation District et al.*, *supra* (R. 42).

The sole question for determination, therefore is:

Does a Statute so construed and so applied, contravene the due process clause of the Fourteenth Amendment to the Federal Constitution?

(c) Constitutional Question Timely Raised.

The validity of the above statute was first drawn into question by appropriate allegations in the Complaint, to-wit:

> "* * * That the action of the Board in imposing illegal assessments in the manner hereinabove described, and in threatening to continue to levy all accrued and accruing delinquencies through the successive future years, as herein stated, constitutes a confiscation of the lands of this Plaintiff and the owners of other lands in said district similarly situated, depriving them of their property without compensation and without due process of law, and denying them the equal protection of the law. * * *" (Complaint Par. XVI.) (R. 9.)

The Federal question was thus timely raised in the court below, although, for the purpose of jurisdiction of this Court in this case, it is immaterial whether the question was actually raised since it was expressly decided by the State Court, and was, therefore, "drawn into question."

Mallinckrodt Chemical Works v. *State of Missouri ex rel. Jones*, 238 U. S. 41, 49;
Cissna v. *State of Tennessee*, 246 U. S. 289, 293;
Silver v. *Silver*, 280 U. S. 117, 122;
Home Insurance Company et al. v. *Dick et al.*, 281 U. S. 397, 407.

(d) Constitutional Question Sufficiently Raised.

i. Pleadings and Opinion.

The constitutional question was raised by specific pleading, as set forth in the preceding paragraph (*c*), in that the Appellant alleged that continued application and enforcement of the Statute, in question herein, would deprive him of his property without compensation and without due process of law, and would deny him the equal protection of the law.

Appellant is cognizant of those cases in which this Court indicates that a general reference to a Statute as being unconstitutional and void does not in itself necessarily raise a Federal question, but in such cases the doubt is dispelled if the State Supreme Court in its decision and opinion shows that it understood that the Federal Constitution was the basis for the objection, and sustains the validity of the Statute under the Federal Constitution as well as under the State Constitution:

> *Cissna* v. *State of Tennessee*, 246 U. S. 289, 293;
> *Saltonstall et al.* v. *Saltonstall et al., Trustees*, 276 U. S. 260, 267;
> *New York ex rel. Bryant* v. *Zimmerman et al.*, 278 U. S. 63, 67-69.

The opinion of the Supreme Court of the State of Washington specifically discusses and decides the Federal question.

> "* * * It is insisted that the statute, if it authorize the annual levy of assessments for

> bond purposes in excess of benefits received from such bond issue, is unconstitutional in that the taking of property without due process of law is thereby made possible. * * *" *Roberts* v. *Richland Irrigation District et al., supra,* page 111 in Wash. Dec. and page 438 in 13 Pac. 2 (R. 44).

and also

> "Our Irrigation Statute in no wise offends against the State Constitution *or the United States Constitution.* We have considered all of the authorities cited and deem it unnecessary to review them, as *State ex rel. Wells* v. *Hartung,* 150 Wash. 590, 274 Pac. 181, is determinative of the case at bar" (Italics ours). *Roberts* v. *Richland Irrigation District et al., supra,* page 115 in Wash. Dec. and page 440 in 13 Pac. 2 (R. 47*a*).

ii. Decisions Cited in Opinion of State Supreme Court.

The Supreme Court of the United States will consider the authorities cited in the Opinion of the State Supreme Court in determining whether the latter Court considered the Federal question.

> *New York ex rel. Bryant* v. *Zimmerman et al.,* 278 U. S. 63, 67-69.

State ex rel. Wells v. *Hartung et al.,* 150 Wash. 590, 598, 274 Pac. 181, cited in the State Supreme Court's Opinion herein (*Roberts* v. *Richland Irrigation District et al., supra,* page 115 in Wash. Dec. and page 440 in 12 Pac. 2) (R. 45), upholds the constitutionality of the Statute involved herein upon the authority of

Fallbrook Irrigation District v. *Bradley,* 164 U. S. 112, which deals exclusively with questions arising under the Fourteenth Amendment to the Federal Constitution.

The State Court in its opinion herein (*Roberts* v. *Richland Irrigation District et al., supra,* page 114 in Wash. Dec. and page 440 in 13 Pac. 2) (R. 47) sets forth an extended quotation from *Kadow et al.* v. *Paul et al. Commissioners,* 274 U. S. 175, which case deals exclusively with the Federal Constitutional question in that it specifically discusses the application of the due process clause of the Fourteenth Amendment to the Federal Constitution to a State Statute providing for local improvement assessments in a diking district. *Kadow et al.* v. *Paul et al. Commissioners, supra,* is also cited and discussed in the quotation from *State ex rel. Wells* v. *Hartung et al., supra,* set forth in the opinion of the State Court herein. *Roberts* v. *Richland Irrigation District et al., supra,* pages 113 and 114 in Wash. Dec. and pages 439 and 440 in 13 Pac. 2 (R. 47).

iii. Certificate of the Chief Justice of the Supreme Court of the State of Washington re Consideration of the Federal Question (R. 87).

Appellant is aware of those cases which state that a certificate of the Chief Justice of the State Supreme Court is not adequate in itself to initiate a Federal question, but Appellant submits, herein, the Certificate of the Chief Justice of the Supreme Court of the State of Washington, re Consideration of the Federal

Question, for the purpose of clarifying the references to the Federal Constitution made herein in the opinion of the State Supreme Court and for consideration in connection with the entire record, as authorized by the following decisions:

Dibble v. *Bellingham Bay Land Company*, 163 U. S. 63, 69-70;

Marvin v. *Trout*, 199 U. S. 212, 223;

Rector v. *City Deposit Bank Company*, 200 U. S. 405, 412;

Illinois Central Railroad Company v. *McKendree*, 203 U. S. 514, 524.

iv. Briefs.

The Federal Constitutional question was also presented in the briefs of counsel as the only issue herein:

> "One question only is presented for consideration by the record in this case, to-wit:
>
> "Has an irrigation district the power to levy assessments against the property of an individual landowner in an amount in substantial excess of the total benefits conferred upon his land by the improvement for the cost of which the assessments are levied?
>
> "It is the contention of the appellant that such a levy constitutes a taking of property without due process of law and is therefore in violation of the Fourteenth Amendment of the Constitution of the United States." Appellant's Reply Brief, pages 1 and 2 (R. 133).

Appellant is aware of the cases in which it is suggested that the briefs used in the court below are not

properly a part of the record and are not adequate to initiate a Federal question:

Live Oak Water Users' Association et al. v. *Railroad Commission of California et al.*, 269 U. S. 354, 358;

but assumes it proper to consider them in connection with the whole record, as was done by this Court in *New Work ex rel Bryant* v. *Zimmermann et al.*, 278 U. S. 63, 67-69, when the excerpts of the briefs referred to are properly certified as part of the record from the State Supreme Court.

(5)

Extent of This Court's Jurisdiction.

We have assigned as error the ruling of the court below, to-wit: that the statute, as construed and applied, does not transgress the due process clause of the Fourteenth Amendment to the Federal Constitution.

(*a*) *Application of the Statute Without Due Process of Law.*

This Court has jurisdiction on appeal to determine whether a statute, not invalid on its face, is applied so as to transgress the Federal Constitution.

Fallbrook Irrigation District v. *Bradley*, 164 U. S. 112;

Tregea v. *Modesto Irrigation District*, 164 U. S. 179, 181;

Dahnke-Walker Milling Company v. *Bondurant*, 257 U. S. 282, 288;
Fiske v. *Kansas*, 274 U. S. 380, 385.

In the case at bar, the appellant is not contending that the statute may not, consistently with the due process clause of the Fourteenth Amendment of the Federal Constitution, create an irrigation district having the power to levy assessments. He does contend, however, that a statute expressly conferring upon such an irrigation district the power to impose aggregate assessments upon real property within its borders *in substantial excess of special benefits conferred on that real property*, contravenes the due process clause of the Fourteenth Amendment to the Federal Constitution.

Appellant does not question the construction placed upon the statute by the State Supreme Court to the effect that that statute, by its terms, does expressly authorize the imposition by an irrigation district of assessments on land in substantial excess and in total disregard of the benefits conferred on that land. He challenges the constitutionality of a statute so construed and applied as transgressing the due process clause of the Fourteenth Amendment to the Constitution of the United States.

In *Norwood* v. *Baker*, 172 U. S. 269, at pages 278-9, this Court said:

> "But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not

> go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. * * *.
>
> "In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity, when its aid is invoked to restrain the enforcement of a special assessment."

In *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 176, the constitutionality of the Wright Act of California was sustained upon the express assumption

> "* * * assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received, and that no land ought in justice to be assessed for a greater sum than the benefits received by it, * * *"

This statement is in direct conflict with the holding herein of the Supreme Court of the State of Washington.

In the case at bar, it is pleaded and admitted by demurrer that the assessments levied in question are in fact *substantially in excess* of benefits to the land assessed.

In *Kadow et al* v. *Paul et al., Commissioners,* 274 U. S. 175, 181, this Court said:

> "* * * When the operation of the law works uniformly as against all parts of the assessment district and results in a higher cost of the improvement and an increased assessment on all the owners of land who have paid, it violates no constitutional right of theirs *as long as their benefits continue respectively to exceed their individual assessments.*" (Citing cases.) (Italics ours.)

See also:

Hagar v. *Reclamation District No.* 108, 111 U. S. 701, 705;
5 McQuillan on Municipal Corporations, Section 2018, 1913 Edition;
1 Page and Jones on Taxation by Assessment, Section 118, page 197, 1909 Edition.

WHEREFORE, it is respectfully submitted that the appeal in the above entitled cause comes within the proper jurisdiction of this Court.

Dated the 15th day of October, 1932.

CHARLES H. FARRELL,
VENABLES, GRAHAM & HOWE,
ALBERT OLSEN,
Attorneys for Appellant.

J. T. MERRITT, *Appellant*,

v.

RICHLAND IRRIGATION DISTRICT [illegible]
[illegible] Defendant; C. [illegible]
STOCKMAN [illegible]
of the Richland Irrigation [illegible]
Son Bryant, and H. [illegible]
ners of Benton County, [illegible]
OTOE IRA C. HAWLEY, [illegible]
County Commissioners of Benton [illegible]
ington, Defendants; J. T. [illegible]
LAND, CHARLES [illegible]
and H. K. DAVENPORT, [illegible]
Trustee, Intervenor, *Appellee*.

APPEAL FROM THE SUPREME COURT
THE STATE OF WASHINGTON.

BRIEF AND ARGUMENT OF APPELLANT.

R. J. VENABLES,
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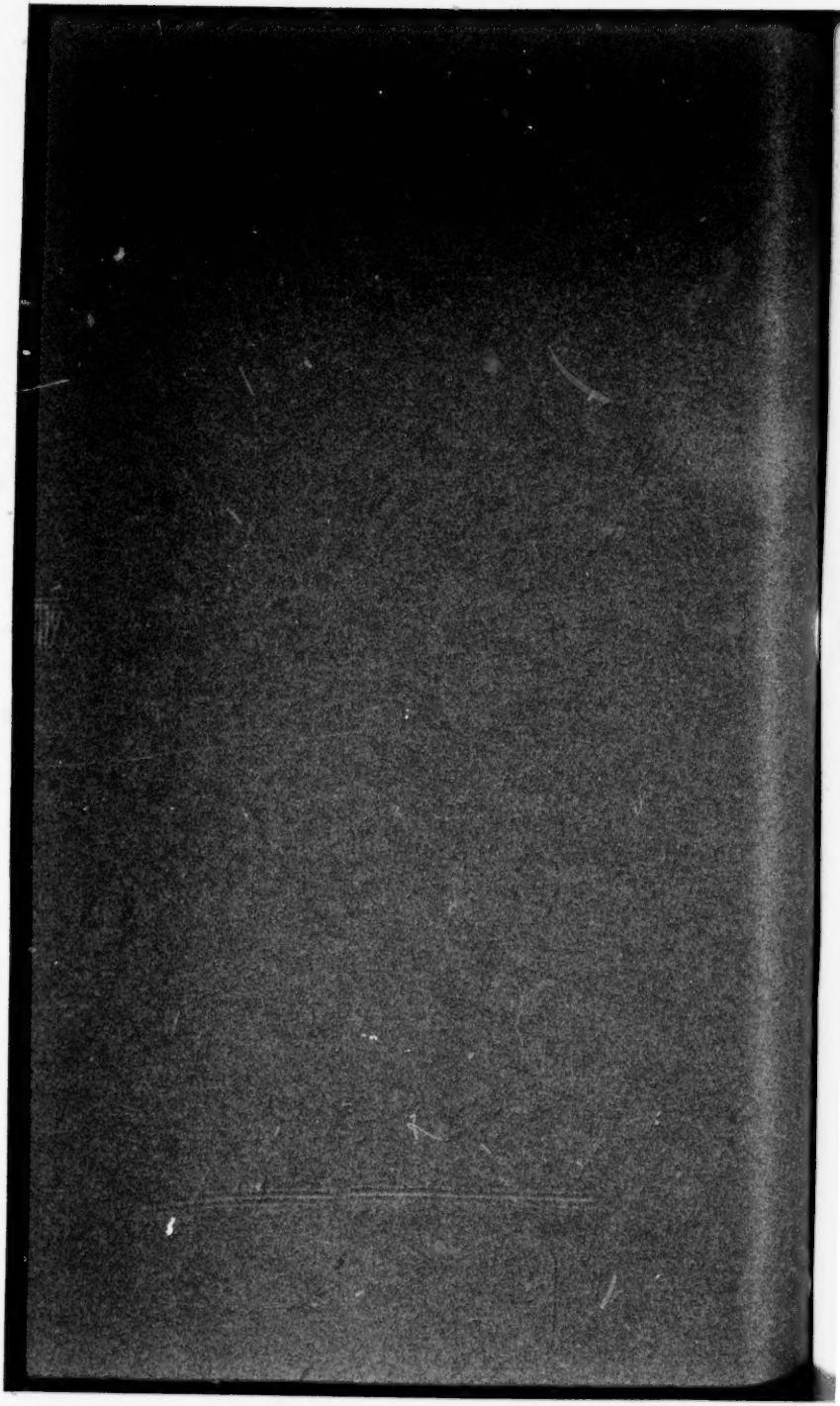

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1932.

No. 516

J. T. ROBERTS, *Appellant,*

vs.

RICHLAND IRRIGATION DISTRICT, an Irrigation District; C. J. BARNETT, W. A. STOCKMAN, and W. C. McINNIS, Directors of the Richland Irrigation District, an Irrigation District, and HARRY FORSYTH, Treasurer of Benton County, Washington; B. J. PACIUS, IRA C. HAWLEY, and H. S. HUGHES, County Commissioners of Benton County, Washington, Defendants; J. T. S. LYLE, DIX ROWLAND, CHARLES HEATH, T. H. BOWDEN and H. E. DAVENPORT, individually and as Trustees, Intervenors, *Appellees.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF AND ARGUMENT OF APPELLANT.

INDEX

SUBJECT INDEX

Page

STATEMENT OF THE CASE 1

ASSIGNMENT OF ERRORS 8

ARGUMENT 10

I. That there is a difference, universally recognized by authorities, between the power to tax for general governmental purposes and the power to levy assessments for local improvements, and that the difference affects the circumstances under which and the extent to which each may be levied 12

II. That the levy made by the directors of an irrigation district is a special assessment for a local improvement and is governed by the rules of law relating thereto 17

A. The legal status of an irrigation district 17

B. Irrigation assessments must be special assessments under the Constitution of the State of Washington .. 24

C. Decisions of Courts of other states having irrigation districts 30

III. That an assessment against a particular piece of land for local improvements in substantial excess of the benefits accruing to that particular land by reason of the improvements constitutes a taking of property without due process of law 35

A. Theory upon which special assessment levies is founded 36

B. Maximum amount of special assessment levy limited to maximum benefit conferred on land assessed 39

INDEX

Page

IV. That the Washington Irrigation District Statute, as construed and applied by the Supreme Court of that State, in the instant case, authorized a levy of special assessments against a tract of land for local improvements in substantial excess of the benefits accruing to such land by reason of the improvements; and, as so construed and applied, contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States 56

A. Analysis of the Decisions of the Supreme Court of the State of Washington which lay down the theory that irrigation district special assessments may be unlimited in amount 58

B. Analysis of the State Supreme Court in the case on appeal 72

C. Analysis of the case of Kadow et al. v. Paul et al. 77

D. Effect of the holding of the State Supreme Court in the case on appeal 86

CONCLUSION 88

APPENDIX i

I. The Irrigation District Law of the State of Washington i

II. Pertinent provisions of the Constitution of the State of Washington x

INDEX

INDEX TO AUTHORITIES

CASES CITED

Page

American Falls Reservoir District et al. v. Thrall et al., 39 Ida. 105; 228 Pac. 236 33

Arnold et al. v. Mayor, etc., of Knoxville, 115 Tenn. 195; 90 S. W. 469; 3 L. R. A. (N. S.) 837 15

Behrens v. Commercial Waterway District No. 1 of King County, 107 Wash. 155; 181 Pac. 892 47

Board of Directors of the Middle Kittitas Irrigation District v. Peterson, 4 Wash. 147; 29 Pac. 995 ..... 19, 29, 30, 39

Board of Directors of Modesto Irrigation District v. Tregea, 88 Cal. 334; 26 Pac. 237 48

Boyd et al. v. Cunningham et al., 164 Wash. 335; 2 Pac. (2d) 647 ..... 48, 82, 84, 87

City of San Diego v. Linda Vista Irrigation District et al., 108 Cal. 189; 41 Pac. 291; 35 L. R. A. 33 28

Columbia Irrigation District v. Benton County et al., 149 Wash. 234; 270 Pac. 813 22

Corcoran et al. v. Board of Aldermen of Cambridge et al., 199 Mass. 5; 85 N. E. 155; 18 L. R. A. (N. S.) 187 45

Cosman v. Chestnut Valley Irrigation District et al., 74 Mont. 111; 238 Pac. 879; 40 A. L. R. 1344 ..... 50, 53, 75

Erickson v. Nine Mile Irrigation District et al., 109 Neb. 189; 190 N. W. 573 50

Fallbrook Irrigation District v. Bradley, 164 U. S. 112; 17 Sup. Ct. 56; 41 L. Ed. 369 ..... 33, 34, 39, 48, 66, 68, 69, 70, 76, 88

Foster v. Commissioners of Cowlitz County et al., 100 Wash. 502; 171 Pac. 539 ..... 47, 80, 81, 82, 84, 85, 86

Gast Realty and Investment Co. v. Schneider Granite Co., 240 U. S. 55; 60 L. Ed. 523; 36 Sup. Ct. 254 42

Hagar v. Reclamation District No. 108, 111 U. S. 701; 28 L. Ed. 569; 4 Sup. Ct. 663 ..... 33, 39, 42

Hansen et al. v. Hammer, 15 Wash. 315; 46 Pac. 332 25

INDEX

Page

Harmon et al. v. Bolley et al. (Ind.), 120 N. E. 33; 2 A. L. R. 609 15

Henrylyn Irrigation District et al. v. Thomas, 66 Colo. 296; 181 Pac. 979 32

Hopkins, Assessor, et al. v. Southern California Telephone Co. et al, 275 U. S. 393; 72 L. Ed. 329; 48 Sup. Ct. 180 38

In re Riverside Irrigation District, 129 Wash. 627; 225 Pac. 636 ..... 21, 22

In re Riverside Irrigation District, 131 Wash. 532; 230 Pac. 649 21

In re Walker River Irrigation District, 44 Nev. 321; 195 Pac. 327 31

Interstate Trust Co. v. Montezuma Valley Irrigation District et al., 66 Colo. 219; 181 Pac. 123 ..... 49, 55

Iowa Pipe & Tile Co. v. Callahan, 125 Iowa 358; 101 N. W. 141; 106 A. S. R. 311; 3 Ann. Cas. 7; 67 L. R. A. 408 44

Kadow et al. v. Paul et al., 134 Wash. 539; 236 Pac. 90 ..... 24, 78, 79, 80

Kadow et al. v. Paul et al., 274 U. S. 175; 71 L. Ed. 982; 47 Sup. Ct. 561 ..... 55, 76, 77, 81, 82, 83, 84, 86

Martin v. District of Columbia, 205 U. S. 135; 51 L. Ed. 743; 27 Sup. Ct. 440 42

Miller & Lux, Inc., v. Board of Supervisors of Madera County et al., 189 Cal. 254; 208 Pac. 304 ..... 35, 67

Myles Salt Co. Inc. v. Board of Commissioners of the Iberia & St. Mary Drainage District, 239 U. S. 478; 60 L. Ed. 392; 36 Sup. Ct. 204; L. R. A. 1918 E. 190 42

Nelson v. Board of Commissioners of Davis County et al. (Utah), 218 Pac. 952 ..... 30, 54

Norris et al. v. Montezuma Valley Irrigation District et al., 240 Fed. 825 54

Norris et al. v. Montezuma Valley Irrigation District et al., 248 Fed. 369 ..... 53, 54, 55

Northern Pacific Railway Company et al. v. John Day Irrigation District et al. (Oregon), 211 Pac. 781 26

INDEX

Page

Norwood v. Baker, 172 U. S. 269; 19 Sup. Ct. 187; 43 L. Ed. 443.....39, 41, 42, 44, 45, 48, 51, 52, 53, 54, 63, 76

Otis Orchards Company v. Otis Orchards Irrigation District No. 1, 124 Wash. 510; 215 Pac. 23..... 23

Perkins & Co. v. Diking District No. 3 of Island County et al., 162 Wash. 227; 298 Pac. 462.....48, 87

Peters et al. v. Union Cap Irrigation District, 98 Wash. 412; 167 Pac. 1085..... 17

Phillip Wagner, Incorporated, v. Leser et al., 239 U. S. 207; 60 L. Ed. 230; 36 Sup. Ct. 66..... 42

Poolman et al. v. Langdon et al., 94 Wash. 448; 162 Pac. 578.... 46

Power v. City of Helena, 43 Mont. 336; 116 Pac. 415; 36 L. R. A. (N. S.) 39..... 45

Roberts v. Richland Irrigation District, et al., 169 Wash.—(unpublished); 69 Wash. Dec. 108; 13 Pac. (2d) 437; (R. 22.).....7, 58, 63, 71, 73, 77, 78, 85

Seanor et al. v. Board of Commissioners, et al., 13 Wash. 48; 42 Pac. 552..... 16

Sears v. Board of Aldermen of Boston, et al., 173 Mass. 71; 53 N. E. 138; 43 L. R. A. 834..... 44

Sioux City Bridge Co. v. Dakota County, 260 U. S. 441; 67 L. Ed. 340; 43 Sup. Ct. 190; 28 A. L. R. 979..... 38

State ex rel. Clancy v. Columbia Irrigation District of Stevens County, 121 Wash. 79; 208 Pac. 27..... 18, 26, 58, 64, 69, 70, 71, 79, 80, 82

State ex rel. Espy Estate v. Board of Commissioners of Pacific County, 48 Wash. 230; 93 Pac. 326..... 45

State ex rel. Mallott v. Board of Commissioners of Cascade County et al., (Mont.) 296 Pac. 1.....51, 53, 75

State ex rel. Wells v. Hartung, et al., 150 Wash. 590; 274 Pac. 181.....5, 58, 63, 64, 65, 67, 70, 71, 77, 82, 85

Stevens et al. v. Melville et al., 52 Utah 524; 175 Pac. 602..... 53

Sullivan v. Blakesley et al., 35 Wyo. 73; 246 Pac. 918..... 32

Thaanum v. Bynum Irrigation District et al., 72 Mont. 221; 232 Pac. 528..... 33

INDEX

Page

Tidewater Co. v. Coster, 18 N. J. Eq. 518; 90 Am. Dec. 634..... 45

Union Trust Company as Executor v. Carnhope Irrigation District et al., 132 Wash. 538; 232 Pac. 341; 234 Pac. 277 (on rehearing).....22, 23

TEXTS CITED

Page

1 Cooley on Taxation, 4th Ed.....12, 13, 38

1 Page and Jones on Taxation by Assessment, 1909 Ed. 14, 37, 44, 87

5 McQuillin on Municipal Corporations, 1913 Ed.....37, 43

25 R. C. L., p. 90..... 25

25 R. C. L., p. 108..... 26

CONSTITUTIONS CITED

Page

CONSTITUTION OF THE STATE OF WASHINGTON:

Article VII, Section 9..... 28

Article VII, Sections 1, 2, 3, 4..... 25

Article VIII, Section 6..... 29

Amendment 14 .....25, 26

STATUTES CITED

Page

Remington's Revised Statutes of Washington:

Sections 4405 to 4459, inclusive..... 78

Section 4422.....77, 79

Sections 7417 to 1705-5, inclusive, "The Irrigation District Law of Washington".....6, 9, 10

Sections 7417-1 and 7417-2..... 6

Section 7434.....6, 59, 73, 78, 85

Section 7436.....6, 25

Sections 7438 to 7440, inclusive..... 72

Sections 7443 to 7445, inclusive.....7, 73, 74

The official and unofficial reports of the only opinion delivered by the Court below are 169 Wash. —(unpublished); Advance Sheets, Washington Decisions, Volume 69, No. 3, p. 108; 13 Pac. (2d) 437, (R. 22.).

STATEMENT OF THE CASE.

In this action, the Appellant Roberts seeks to enjoin the levy of an assessment against his lands by the Appellee Irrigation District upon the ground that such a levy substantially exceeds the benefits conferred on the land assessed by the improvements for the payment of which the levy is made, and so constitutes a taking of property without due process of law in contravention of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The facts are undisputed. This is an appeal from the judgment of the Supreme Court of the State of Washington which affirmed, with costs, a judgment of the Superior Court of Benton County, Washington (R. 30.), which sustained demurrers to Appellant's complaint and (upon Appellant's refusal to plead further) dismissed it with costs. (R. 18.)

The material facts alleged in the Complaint

(R. 1.) and admitted by the demurrers (R. 15, 16, 17.) are in substance as follows:

The Appellant, on January 1, 1919, was and at all times since has been the owner of forty acres of land in Benton County, Washington; the Richland Irrigation District was organized, and the Appellant's land included therein over his objection; the Irrigation District has expended the sum of $538,000.00 in developing irrigation facilities for land within the boundaries of the District to pay for the cost of which bonds in the sum of $538,000.00 were authorized and issued by the Richland Irrigtion District on July 1, 1920. These bonds bore interest at the rate of six (6%) per cent per annum.

Prior to the time the District was organized or improvements constructed, the Appellant owned a valuable water right appurtenant to his land; by reason of the improvements constructed by the Richland Irrigation District, Appellant's land and water right were benefited in the sum of $10.00 per acre on the irrigable portion of his land; thirty-five acres of the Appellant's land were irrigable; *the total benefit to Appellant's land and water right, by reason of the improvements made by Richland Irrigation District aggregated the sum of $350.00.*

> "That no other benefits of any description accrued to this Appellant or to the lands owned by him by reason of the acquirement of said additional water rights, the making of said improvements, or the expenditure of any funds by said District, in excess of the sum of $350.00." (R. 4.)

The total liability of the Appellant's land for principal and interest on said bonds was the sum of $560.00. (R. 5.) During the years of 1920 to 1929 inclusive, the Board of Directors of the Richland Irrigation District, for the purpose of paying interest and principal on the bonds issued by it, levied the total sum of $1,168.85 against the lands of Appellant. (R. 5, 6.) For the purpose of protecting his title, the Appellant paid these assessments.

The Appellees have made all preparation for and are threatening to levy assessments against the land of the Appellant in 1931 in the sum of $757.53;

> "That the threatened levy of $757.53 is to be made upon a fundamentally wrong and illegal theory and basis in this: That no part of said levy is made on account of or with reference to any special benefits accruing to the real property of the Plaintiff hereinabove referred to. That said assessment has been levied for the purpose of creating a fund to take up or eliminate the deficiencies in the bond interest and bond retirement funds of said Irrigation

District, *due wholly or in part to a failure of certain landowners within the District to pay assessments which have heretofore or will hereafter be levied against lands in said District belonging to such other persons.*" (R. 6.)

The Directors of the Richland Irrigation District have stated to this Appellant that it is their fixed policy and intention to assess and re-assess all delinquencies, which have heretofore or may hereafter accrue, against the lands of this Appellant and other tenants of the District, who continue to pay their assessments without delinquencies, until such assessments will create a fund sufficient to pay the entire outstanding indebtedness so as to retire said bonds, both principal and interest; *and that they propose to make such assessments without reference to the special benefits which have accrued to the real property of the Appellant and any other landowners in the District who continue to pay their assessments, but that they will be governed in making said assessments solely by a consideration of the amount of money required to pay said indebtedness, principal and interest.* (R. 6, 7.)

The threatened levy by the Appellees is equal to or greater than the gross income derived from the produce of this land. It is in substantial excess of the net income derived therefrom, and the threat-

ened levy for 1931 is equal to or in excess of one-third of the reasonable market value of the property. (R. 7.) Further assessments on the same theory and basis for the year 1932 and successive years will exceed the total value of the property and be in substantial excess of any benefits received by reason of the aforesaid improvements. The threatened levy, if made, will create an apparent cloud on Appellant's title and destroy the marketability of his land, and will cause the Appellant irreparable damage. (R. 7, 8.)

The Appellees are the Irrigation District, its officers, the officers of the County, through whose offiicial acts the threatened assessment will be made and enforced, and the Intervenors, individually and as Trustees, who are the holders of a substantial portion of the said bonds of the district.

The Irrigation District and its officers, the officers of Benton County, and the Intervenors, filed their separate demurrers. The Trial Court sustained all of the demurrers upon the authority of *State ex rel Wells v. Hartung, et al.*, 150 Wash. 590, 274 Pac. 181. (R. 18.) The Appellant refused to plead further, and judgment of dismissal and for costs was entered (R. 18.), from which the Appellant appealed

to the Supreme Court of the State of Washington. (R. 20.)

The Supreme Court of the State of Washington entered judgment affirming that of the lower court. (R. 30.) Thereupon, an appeal was taken to this Court, and is docketed herein as Cause No. 516 of the October Term, 1932.

The statute, the validity of which was drawn into question herein, is the Irrigation district law of the State of Washington. The relevant portions of the statute are summarized in an appendix hereto.

At this point we only call attention to Remington's Revised Statutes of Washington, Sections 7417-1 and 7417-2 (Appendix ii.), which set forth the purposes and powers of an irrigation district, and Remington's Revised Statutes of Washington, Section 7436 (Appendix vi.), which states that irrigation district assessments must be made according to benefits, and Remington's Revised Statutes of Washington, Section 7434 (Appendix v.), upon which the State Court primarily rests its opinion, to-wit:

> "Said bonds and interest thereon * * * shall be paid by revenue derived from an annual assessment upon the real property of the district, *and all the real property in the district shall be and remain liable to be assessed for such*

payments until fully paid as hereinafter provided." (Italics ours.)

Roberts v. Richland Irrigation District, et al., 69 Wash. Dec. 108, 112; 13 Pac. (2d) 437, 439 (R. 26.),

and Remington's Revised Statutes of Washington, Sections 7443 to 7445 (Appendix ix.), which provide that acquired property may be sold at its reasonable market value.

The opinion of the State Supreme Court sets forth and applies what is known in the West as "the Doctrine of the Last Faithful Acre"—namely, that, though an irrigation district exercises no governmental functions but has only those powers which are expressly conferred upon it by statute (Appendix ii.), yet it may levy assessments against an individual landowner, for the payment of improvements erected by it, in substantial excess of the benefits conferred upon his lands by such improvements. After the landowner has paid the full amount of his benefits, he may thereafter be assessed to pay for the benefits to other landowners in the district who have defaulted in their payments, and the amount of such assessments, for the delinquencies of others, is limited only by the requirements of the outstanding bonds. While such assessments for the delinquencies of others must be pro-

portionately levied, the amount thereof is limited only by the amount of the bonded obligation, from which it follows that, if all landowners save one within a district cease payments, their delinquencies may be assessed and re-assessed against the last faithful acre until it has paid an amount sufficient to liquidate the entire bonded indebtedness. The Appellant challenges this holding upon a consideration of fundamental principles and constitutional rights. The constitutional question involved far transcends the individual monetary problem presented; it is one of paramount importance to thousands of struggling, tax-burdened farmers in the irrigated districts in the West.

ASSIGNMENT OF ERRORS.

I.

The Supreme Court of the State of Washington erred in affirming the order of the Superior Court for Benton County of the State of Washington sustaining demurrers of all adverse parties to Appellant's complaint.

II.

The Supreme Court of the State of Washington erred in sustaining the judgment of the Superior Court for Benton County, of the State of Washing-

ton, dismissing Appellant's complaint with costs upon his refusal to plead further after demurrers thereto of all adverse parties had been sustained.

III.

The Supreme Court of the State of Washington erred in overruling the contention of the Appellant that the irrigation district law of the State of Washington (Appendix i.) as applied, was repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States, and in holding that the said statute as applied is valid and does not transgress the due process clause of the Fourteenth Amendment to the Constitution of the United States.

IV.

The Supreme Court of the State of Washington erred in holding that the Legislature of the State of Washington has the power, by statutory enactment, to confer upon an irrigation district the power to levy local improvement assessments in substantial excess of and wholly without regard to benefits conferred upon the real property assessed, and that a statute expressly conferring such power does not contravene the due process clause of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

This appeal presents the following question for determination:

Does the Irrigation District statute of the State of Washington (Appendix i.) transgress the Fourteenth Amendment to the Federal Constitution, in that, by its express terms, and by judicial construction thereof, and by its application, it takes property without due process of law by authorizing the levy of assessments by an irrigation district in substantial excess of the benefits to the lands assessed, solely for the purpose of paying for benefits conferred upon the lands of others in the district who have defaulted in their payments?

If the answer to this question is in the affirmative, the Appellant has a cause of action, and the judgment should be reversed. If in the negative, he has no cause of action and the judgment should be affirmed.

In support of Appellant's contention we propose to establish the following propositions:

I.

That there is a difference, universally recognized by authorities, between the power to tax for general governmental purposes and the power to levy assessments for local improve-

ments, and that the difference affects the circumstances under which and the extent to which each may be levied.

II.

That the levy made by the directors of an irrigation district is a special assessment for a local improvement and is governed by the rules of law relating thereto.

III.

That an assessment against a particular piece of land for local improvements, in substantial excess of the benefits accruing to that particular land by reason of the improvements, constitutes a taking of property without due process of law.

IV.

That the Washington Irrigation District statute, as construed and applied by the Supreme Court of that State, in the instant case, authorizes a levy of special assessments against a tract of land for local improvements in substantial excess of the benefits accruing to such land by reason of the improvements; and, as so construed and applied, contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States.

I.

THAT THERE IS A DIFFERENCE, UNIVERSALLY RECOGNIZED BY AUTHORITIES, BETWEEN THE POWER TO TAX FOR GENERAL GOVERNMENTAL PURPOSES AND THE POWER TO LEVY ASSESSMENTS FOR LOCAL IMPROVEMENTS, AND THAT THE DIFFERENCE AFFECTS THE CIRCUMSTANCES UNDER WHICH AND THE EXTENT TO WHICH EACH MAY BE LEVIED.

The power of levying and collecting taxes is a power that inheres in sovereignty. It is an indispensable attribute to the existence and maintenance of government.

1 Cooley on Taxation, p. 149, Sec. 57, 4th Ed.

Taxes are of two kinds, general taxes for general purposes of government and special taxes for local improvements. While in common parlance they are treated as similar, there is a substantial difference in (1) the constitutional basis on which they are justified, (2) the purposes for which revenue is used, and (3) the extent to which they may be levied. The distinction between the two is clearly drawn by text writers:

> "The difference between a special assessment and a tax are that (1) a special assess-

ment can be levied only on land; (2) a special assessment cannot (at least in most states) be made a personal liability of the person assessed; (3) a special assessment is based wholly on benefit; and (4) a special assessment is exceptional both as to time and locality. The imposing of a charge on all property, real and personal, in a prescribed area, is a tax and not an assessment, although the purpose is to make a local improvement on a street or highway. A charge imposed only on property owners benefited is a special assessment rather than a tax, notwithstanding the statute calls it a tax.

"The power to levy such assessment is undoubtedly an exercise of the taxing power, but the exercise of the taxing power in imposing an assessment does not necessarily make the assessment a tax."

1 Cooley on Taxation, pp. 106-7, Sec. 31, 4th Ed.

"While an assessment is in one sense a tax, it is a tax of a peculiar nature, differing from a general tax in important characteristics. It is said that an assessment is 'distinguishable from our general idea of a tax but owes its origin to the same source of power.' The chief and most important distinctions between a tax and a local assessment is that a tax is levied for the purpose of raising revenue and paying expenses of the government. The only benefits which the taxpayers receive, they receive as members of organized society. Many of the most valuable of these benefits would inure to them if they were not possessed of any property to be taxed, if, possessing property some of them were able to evade the payment of the tax, they would receive the same benefits as they receive in case of payment. The indi-

vidual taxpayer is, therefore, poorer in a sense by reason of the payment of the tax. The local assessment, on the other hand, does not, in theory at least, leave the property owner who pays his assessment any the poorer by reason of the entire transaction since he is fully compensated by the special benefits conferred upon him by the improvement for the amount of the assessment paid. This distinction between a tax and a local assessment is very generally recognized by the courts. Furthermore, a tax is a recurring charge, while an assessment is levied occasionally only."

1 Page and Jones on Taxation by Assessment, p. 59, Sec. 35, 1909 Ed.

This distinction is concisely stated by a well reasoned decision rendered by the Indiana Supreme Court:

"A distinction should be drawn and observed between the power to levy and collect taxes for general government purposes and the power to make such special assessments. The power to tax for the purpose of raising revenue to administer the affairs of government is the highest sovereign power. The amount of money which a government has power to raise by taxes for such purposes is limited only by the necessities of the government. The government extends to the citizen the protection of its laws, and he enjoys the rights, privileges and immunities of citizenship. One of the highest duties of a citizen is to contribute to the public support of the government under which he lives. Taxes levied for general revenue purposes are not based on the principle of special or peculiar benefit to the individual taxpayer, but are levied for the general benefit and wel-

fare of the nation, state, or municipality. * * * As distinguished from taxes for revenue, special assessments are not levied for the purpose of paying the expense of administering the government of any nation, state, or municipality, but for the purpose of paying the cost and expenses of making a local improvement of a public nature. The amount which can be raised by such assessments for such a purpose is limited by the actual benefits which accrue to the property affected thereby. In theory the benefits which accrue to the general public are paid by the municipality in which the improvement is located, out of its general revenue raised by taxation, while the property which is affected and benefited by the improvement in a manner not common to the public is assessed with the special and peculiar benefits which actually accrue to it as a result of the improvement. The amount so assessed is not regarded as a burden imposed for the support of government; but the theory on which such assessments are sustained is that the property on which they are imposed is increased in value or otherwise peculiarly benefited to an amount equal to the assessment."

Harmon, et al., v. Bolley, et al. (Indiana), 120 N. E. 33, 36; 2 A. L. R. 609, 615.

For a learned and exhaustive consideration of this question, see also

Arnold et al. v. Mayor, etc. of Knoxville, 115 Tenn. 195; 90 S. W. 469; 3 L. R. A. (N. S.) 837.

In an early case the Supreme Court of Washington had occasion to discuss this distinction in the following language:

> "* * * we think the overwhelming weight of authority is that the assessment for benefits in such cases does not fall under the definition of the word 'tax' as used in the constitution—that the word 'tax' has reference to general revenue for the purpose of maintaining and carrying on the government, where the benefits are alike enjoyed by all, and where no special benefits, as in the case of the assessment for improvements, are enjoyed. Of course, the idea of compensation is the basis of all theories of taxation, but an element of special benefits enters into the one, and is the distinguishing feature between taxes and assessments for benefits.
>
> 'Both forms,' says *Desty on Taxation* (Volume 1, p. 4), 'are for public purposes, and both alike burdens on property; the only substantial difference between the two being that general taxation is based upon value, and subject to the constitutional rule of uniformity, while special taxation for benefits is not.'
>
> "The law makes a plain distinction between taxes which are burdens or charges imposed upon persons or property to raise money for public purposes, and assessments for city and village improvements, which are not regarded as burdens, but as an equivalent or compensation for the enhanced value which the property of the person assessed has derived from the improvement."
>
> *Seanor et al. v. Board of Commissioners, et al.*, 13 Wash. 48, 55; 42 Pac. 552, 555.

The failure of the Supreme Court of the State of Washington to take cognizance of and apply the universally recognized distinction made by the foregoing authorities is the first and fundamental error in its treatment of the problem herein presented.

II.

THAT THE LEVY MADE BY THE DIRECTORS OF AN IRRIGATION DISTRICT IS A SPECIAL ASSESSMENT FOR A LOCAL IMPROVEMENT AND IS GOVERNED BY THE RULES OF LAW RELATING THERETO.

In the light of this distinction between a tax and an assessment, it is necessary to inquire into the nature of the assessment levied by an irrigation district, organized under the laws of the State of Washington, and determine whether it is a special assessment or a general tax.

A. The Legal Status of an Irrigation District.

For the purpose of suing and being sued and with respect to its authorized contracts, irrigation districts have been treated as municipal corporations, in the sense that they are public corporations having a separate legal entity.

Peters et al. v. Union Cap Irrigation District, 98 Wash. 412; 167 Pac. 1085.

State ex rel. Clancy v. Columbia Irrigation District of Stevens County, 121 Wash. 79; 208 Pac. 27.

In holding that an irrigation district is not a municipal corporation exercising governmental functions, the Supreme Court of the State of Washington said:

> "* * * The powers conferred upon these irrigation districts are not primarily that of government or regulation, or even of taxation, though such are conferred to a limited degree as necessarily incident to the main power conferred. The primary and main power thus conferred is that of local improvement of the real estate therein for the benefit of its owners, and at their expense. In one sense, the district thus constituted is not a public corporation at all; its object has no connection with any of the public duties which the state owes to its inhabitants. In a certain sense, it is only the purely private interest of the freeholders that is sought to be subserved.
>
> "If, in the absence of constitutional provisions prohibiting special legislation, the legislators saw fit to provide that the farms of three adjoining proprietors should be improved by the erection of a dike or the excavation of a ditch upon certain conditions therein provided, we do not think it would be claimed that the three farms and their owners were by said act constituted a public corporation, and we are certain that such legislation would not create a municipal corporation, in any sense whatever. The act in question is of substantially the same

kind as would be such special act. It is true that it may be extended throughout a large area, and affect the rights of a large number of people, but it must be remembered that it does not affect their rights in the way that ordinary municipal corporations do. They pay taxes, it is true, or an assessment in the nature of a tax, *but it is not for the benefit of the community at large within such districts, but for the special benefit of the owners of real estate situated therein, and it is proportioned to the benefits which they are to receive from the improvement.* In a certain sense, no tax in the ordinary use of that word is imposed; each owner of land contributes to a common fund, and receives back from such fund the exact amount of his contribution. Such is not the nature of a tax levied in any of the corporations which have been held to be municipal corporations. In those, every taxpayer must pay his taxes according to the value of his property, regardless of the question as to whether or not his property is directly benefited thereby." (Italics ours.)

Board of Directors of the Middle Kittitas Irrigation District v. Peterson, 4 Wash. 147, 152; 29 Pac. 995, 996.

Some years later, the Supreme Court of the State of Washington had occasion to consider whether an irrigation district was a municipal corporation so as to preclude it from including territory already within the boundaries of another irrigation district. In holding that it was not a munici-

pal corporation, when considered in that sense, the Court used the following language:

> "* * * We may concede this to be a sound general rule applicable to pure municipal corporations whose functions are purely governmental, and whose revenues in aid of such functions are exacted in the form of general taxes upon private properties within the territorial limits of such corporation without regard to the apportioning of such taxes according to any special benefits flowing to such private properties. These irrigation districts are not such municipal corporations. Indeed, while they are in form public or quasi municipal corporations, in the sense that they have a legal entity, and have an organized local government for the purpose of functioning within their very narrow limited powers which can at most be said to be governmental only in the most limited sense, they are, for the purpose of raising revenue to construct their respective irrigation systems, procure water, and furnish the same to lands within their respective boundaries, little else than local improvement districts whose revenues can be exacted by the burdening of properties within their boundaries only in proportion to the benefits accruing from such works and service to such properties. * * *
>
> "By further provisions of that section, and some others following, the method of levying such assessments is prescribed, which includes an opportunity on the part of the owners of the property sought to be assessed to be heard before a final determination and apportionment of the amount of such assessments against the several benefited private properties within the district; all much like the usual levying

of special assessments for local improvements. We find nothing in the statute as it now exists, or has existed since 1915, conferring upon irrigation districts any general power of taxation apart from the consideration of benefits."

In re Riverside Irrigation District, 129 Wash. 627, 629; 225 Pac. 636, 637.

The language of the court in this case was modified in a rehearing in which they indicated that they did not intend to place it in the same class as a special improvement district. The court said:

"That part of the Departmental opinion which likens an irrigation district to a local improvement district contains language which we now hold may be discarded. An irrigation district is purely a creature of statute, and has the powers which the statutes confer directly or by necessary implication, and no others; but it is a legal entity that has full authority to exercise all of the powers which the statutes so confer."

In re Riverside Irrigation District, 131 Wash. 532, 533; 230 Pac. 649, 650.

It will be noted that this apparent modification specifically recognizes the limitation of the powers of an irrigation district to those expressly conferred by statute. These powers are enumerated in a section of the Code (Appendix ii.) and it has never been contended or held by the Washington

Supreme Court that these statutory powers included the exercise of governmental functions or the concomitant power of levying a general tax.

In a later case, the Supreme Court of Washington quotes with approval from *In re Riverside Irrigation District,* 129 Wash. 627; 225 Pac. 636, and summarizes its decisions on the question of the status of an irrigation district and comes definitely to the conclusion that as that term is used in our constitution, an irrigation district is not a municipal corporation, exercising governmental functions or having the power to levy general taxes.

> *Columbia Irrigation District v. Benton County, et al.,* 149 Wash. 234; 270 Pac. 813.

The Supreme Court of the State of Washington held also that assessments by an irrigation district must be made according to benefits, and that an assessment upon an ad valorem basis is absolutely void:

> *Union Trust Company as Executor v. Carnhope Irrigation District, et al.* 132 Wash. 538; 232 Pac. 341; 234 Pac. 277 (on rehearing).

In the case last cited, the State Supreme Court further held that the amount of individual benefits

is to be determined by the increase in the market value of the property affected. On page 549 in 132 Wash. and page 345 in 232 Pac.:

> "* * * This price or value is to be determined as it was before the improvement was in, and as it is after the improvement has been constructed. The increase, if any, which the improvement has made in this value is the limit of the benefit which that property has acquired by reason of the improvement."

And the Court notes that while many elements are taken into consideration in arriving at the amount of this increase, the benefit is measured by the increase only, and cites to that effect, on page 541 in 132 Wash. and page 342 in 232 Pac., its own decision in *Otis Orchards Company v. Otis Orchards Irrigation District No. 1,* 124 Wash. 510; 215 Pac. 23.

A review of the Washington cases clearly demonstrates that while for certain purposes irrigation districts are treated as municipal corporations, i. e., as public corporations having a separate legal entity, yet when considering their power of taxation, they have always been treated as having the power of special assessment only. It has never been held that they have the general power of taxation or that they exercise any general governmental functions.

In *Kadow et al. v. Paul et al.*, 134 Wash. 539, 553; 236 Pac. 90, 95, the State Supreme Court said:

> "* * * Diking districts as well as irrigation districts are public improvements. The cost in each is to be assessed against the property benefited."

B. Irrigation Assessments Must Be Special Assessments Under the Constitution of the State of Washington.

The foregoing should be conclusive of the question under consideration, but in view of the fact that the very basis of the Appellant's contention is that an irrigation district has only the power of special assessment, we feel obliged to extend the discussion further and point out, first, that the theory that irrigation assessments are special assessments is the only theory on which their levy can be justified under the Constitution of the State of Washington, and second, that, in other states having irrigation district statutes, the courts have, with unanimity, classified them as special assessments.

The Supreme Court of Washington has held that the Legislature may confer the power to levy special assessments on a public corporation, such as diking districts.

Hansen et al. v. Hammer, 15 Wash. 315; 46 Pac. 332.

Amendment 14 to the Constitution of the State of Washington* requires all real property in one taxing unit to be uniformly taxed for public purposes only, i. e., proportionately and according to value. (Appendix xiii.) Irrigation district assessments, by virtue of Section 7436 of Remington's Revised Statutes of Washington, must be made according to benefits. (Appendix vi.) How, then, can the levy of an irrigation district be justified? Only on the theory that it is a special assessment and not subject to the constitutional provisions applicable to general taxes.

It is well settled that the constitutional requirement of uniformity does not apply to special assessments.

25 R. C. L., p. 90, and cases cited therein, and in the Supplements thereto.

As applied to irrigation assessments, we find the Oregon Supreme Court saying:

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*This Amendment strikes out Sections 1, 2, 3, and 4 of Article VII of the Constitution of the State of Washington, but at the same time re-enacts the material portions thereof relevant herein. (Appendix xiv.)

> "* * * This restriction contained in the Oregon constitution has no relation to special assessments for benefits to property. It relates to taxation for governmental purposes."
>
> *Northern Pacific Railway Company et al. v. John Day Irrigation District, et al.* (Oregon), 211 Pac. 781, 784.

That, it is submitted, would be the only answer that could be made to a contention that the Washington irrigation statute is unconstitutional in that it does not require assessments to be made according to value.

On the other hand, special assessments can be levied against the property benefited, which, in this case, is the real property owned.

> 25 R. C. L. p. 108, and the cases cited therein and in the Supplements thereto.

Amendment 14 to the Constitution of the State of Washington (Appendix xiii.) provides that the property of counties, cities and other municipal corporations shall be exempt from taxation. Yet the State Supreme Court has said that real property acquired by a county is subject to irrigation district assessments.

> *State ex rel. Clancy v. Columbia Irrigation District of Stevens County,* 121 Wash. 79; 208 Pac. 27.

This conclusion can be justified only on the theory that the assessment levied by an irrigation district is a special assessment and not a general tax, and for that reason the provision in the Washington constitution is inapplicable.

This identical question was decided in the same manner by the Supreme Court of California in construing the irrigation laws of that state, after which those of Washington are modelled. The California constitution exempted the property of the "state, or any county, or municipal corporation" from taxation. The California Supreme Court, in holding that property owned by a municipality within an irrigation district was liable for irrigation district assessments said:

> "* * * But the assessment to satisfy which the lands in question were sold is not a tax, within the meaning of said provision of the constitution. * * * The district, when formed, is a local organization, to secure a local benefit, to be derived from the irrigation of lands from the same source of water supply, and by the same system of works. It is, therefore, a charge upon the lands benefited, or capable of being benefited, by a single local work or improvement, and from which the state, or the public at large, derives no direct benefit, but only that reflex benefit which all local improvements confer."

City of San Diego v. Linda Vista Irrigation District, et al., 108 Cal. 189; 41 Pac. 291, 292; 35 L. R. A. 33, 38.

Section 9 of Article VII of the Constitution of the State of Washington (Appendix x.) reads as follows:

> "The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same."

By virtue of the second part of this section, the legislature may authorize municial corporations to assess and collect *taxes* for all corporate purposes providing such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same But taxes in proportion to benefits clearly would not be uniform in respect to persons and property.

On the other hand, the first part of this section clearly authorizes special assessments in proportion to benefits. This section of the Constitution is of particular importance in that it recognizes the

distinction between taxes and assessments and defines the basis on which each should be levied.

Again, in Section 6 of Article VIII of the Constitution of the State of Washington (Appendix xii.), we find a provision limiting the indebtedness of a county, city or other municipal corporation. The obvious policy of this provision was to prevent counties, cities and other political subdivisions from incurring unlimited indebtedness collectible from property owners in the form of general taxation. The Washington Supreme Court, in interpreting this section of the Constitution, holds that irrigation districts are not municipal corporations exercising general governmental functions and the concomitant power of general taxation, but that the obligations incurred by an irrigation district are to be paid by the collection of special assessments from the property benefited.

> *Board of Directors of the Middle Kittitas Irrigation District v. Peterson*, 4 Wash. 147; 29 Pac. 995.

It is hardly consistent to now contend that irrigation districts are municipal corporations and have the power of general taxation to meet the indebtedness incurred by them.

Thus we see that the theory of irrigation assessments being special assessments is consistent with the provisions of the Constitution of the State of Washington, while the theory that the levy of an irrigation district is a general tax is entirely inconsistent therewith.

Particular attention is called to the case of *Board of Directors of the Middle Kittitas Irrigation District v. Peterson,* 4 Wash. 147; 29 Pac. 995, which clearly defines the nature of an irrigation district under the laws of the State of Washington, and applies those fundamental legal conceptions which at once establish and limit the powers of taxation granted to an irrigation district by statute.

C. Decisions of Courts of Other States Having Irrigation Districts.

On reviewing the decisions of the courts of other states having irrigation district statutes, we find unanimous concurrence of authorities to the effect that irrigation district assessments are special assessments.

Assessments by an irrigation district are special assessments.

Nelson v. Board of Commissioners of Davis County, et al. (Utah), 218 Pac. 952.

The Supreme Court of Nevada says:

"Counsel fail to distinguish between the phrases 'assessment of benefits' and 'special assessments' to be charged or levied against the land within the district, and the term 'tax,' as ordinarily used in revenue laws. It is the plan of assessment of benefits and special assessment of benefits required to be carefully ascertained and equitably and fairly apportioned or distributed to the lands within the district as nearly as can be, that appeals to us as commending the act as a wise public policy. * * *

"* * * There is a wide difference in law between a tax and an assessment. In the one case the taxes are assessed against the individual and become a charge upon his property generally. In the other, the assessment, being for the benefits accruing to the specific property, becomes a charge only upon and against it, and liability for the charge is confined to the particular property benefited. Therefore an assessment or special assessment is not embraced within the meaning of the word 'taxation' because the owner of the property assessed gets back the amount of his assessment in the benefits received by his property and therefore does not bear the burden of a tax."

In re Walker River Irrigation District, 44 Nev. 321; 195 Pac. 327, 330.

The Supreme Court of Wyoming, in considering the status of irrigation districts and considering the nature of the levy made by them, said:

"* * * They are merely special state organizations for state purposes with limited

powers, created to perform certain work which the policy of the state requires or permits to be done, and to which the state has given a certain degree of discretion in reclaiming desert lands. *In re Bonds of Orosi Public Utility District* (Cal. Sup), 235 Pac. 1004; *Thaanum v. Irrigation District*, 72 Mont. 221; 232 Pac. 528; *People v. Sacramento Drainage District*, 155 Cal. 373, 382; 103 Pac. 207; *Reclamation District, etc., v. County of Sacramento*, 134 Cal. 477; 66 Pac. 668. Nor are they subdivisions of any city, town, village, or county in the state. * * *

"* * * The exactions authorized to be made by such districts may in a broad sense, be termed taxes, but they are distinguishable therefrom, for they are levied for local benefits to be spread on the property in the districts in proportion to the peculiar advantages accruing to each parcel therein from the improvement made. Whether in the form of special assessments or in the form of taxes, they are essentially assessments for local benefits, and not levied for general governmental purposes, as are the taxes contemplated in the constitutional provisions mentioned and referred to in the statement of facts."

Sullivan v. Blakesley et al., 35 Wyo. 73; 246 Pac. 918, 922.

The levy of an irrigation district under Colorado laws is a special assessment.

Henrylyn Irrigation District et al. v. Thomas, 66 Colo. 296; 181 Pac. 979.

So also in Montana:

Thaanum v. Bynum Irrigation District et al., 72 Mont. 221; 232 Pac. 528.

And in Idaho:

"The Idaho Irrigation District Law, since its enactment, in 1898, has been frequently amended and modified to make it more applicable to existing conditions, but it has always recognized as a basic principle of the law that the assessments levied by virtue of its provisions differ from a general tax levied for governmental purposes in the important particular that such assessments can only be levied upon the basis of benefits."

American Falls Reservoir District et al. v. Thrall et al., 39 Ida. 105; 228 Pac. 236, 248.

Assessments levied by a reclamation district are local improvement assessments:

Hagar v. Reclamation District No. 108, 111 U. S. 701; 28 L. Ed. 569; 4 Sup. Ct. 663.

In the case af *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112; 17 Sup. Ct. 56; 41 L. Ed. 369, it was the assumption of the court that the assessments of an irrigation district were local improvement assessments. On page 176 in 164 U. S.:

"Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is

> still the exercise of the same power as the latter, * * * *. Assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received and that no land ought in justice to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry."

The Supreme Court of California declared itself bound by the assumption so made in the case of *Fallbrook Irrigation District v. Bradley, supra.* In the course of its opinion it said:

> "The only difficulty in applying the decisions on this subject is to determine whether or not the district created by the subordinate body in pursuance of an act of the Legislature is in its nature a public corporation, the inhabitants and property owners of which are subject to taxation for municipal purposes without any hearing as to the benefits to be derived from the creation and conduct of such a corporation, or is an assessment district created for the primary purpose of assessing upon private lands the benefits to be derived thereby from the public improvements for the purpose the district is formed.
>
> "In the present case, however, we are not subject to any embarassment in such application because that question has been conclusively determined by the Supreme Court of the United States in its holding that an irrigation district organized under the Wright law is such

a district as could only be properly formed by notice to the property owners at some stage of the proceedings of the inclusion of their lands within the district and by giving them a hearing before some tribunal having power to decide the matter, in advance, and, if possible, sustain their contention that their lands would not be benefited by the proposed improvement."

Miller & Lux, Inc., v. Board of Supervisors of Madera County et al., 189 Cal. 254; 208 Pac. 304, 310.

Considering the nature of the levy of an irrigation district as established by the foregoing citations, it would seem that we are justified in predicating our contention on the theory that the levy made by an irrigation district in the State of Washington is a special assessment.

III.

THAT AN ASSESSMENT AGAINST A PARTICULAR PIECE OF LAND FOR LOCAL IMPROVEMENTS IN SUBSTANTIAL EXCESS OF THE BENEFITS ACCRUING TO THAT PARTICULAR LAND BY REASON OF THE IMPROVEMENTS CONSTITUTES A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Since the levy made by an irrigation district is a special assessment for a local improvement,

the nature and extent of the power and the manner of its exercise is to be governed by the rules of law governing the power to levy special assessments.

A. Theory Upon Which Special Assessment Levies Is Founded.

In considering the nature and extent of this power, the first matter of inquiry is the theory on which it is founded. This theory is ably set forth in the text books of three well known writers.

> "The foundation of the power to lay a special assessment or a special tax for a local improvement of any character, whether it be opening, improving or paving a sidewalk or street, or constructing a sewer, or cleaning or sprinkling a street, is the benefit which the object of the assessment or tax confers on the owner of the abutting property, or the owners of property in the assessment or special taxation district which is different from the general benefit which the owners enjoy in common with the other inhabitants or citizens of the municipal corporation. 'The whole theory of local taxation or assessments is that the improvements for which they are levied afford a remuneration in the way of benefits. A law which would attempt to make one person, or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large would not be an exercise of the taxing power, but an act of confiscation. In effect it would be transferring the property of one individual to another. These are legal

truisms which have been long entertained and firmly established.'"

5 McQuillin on Municipal Corporations, p. 4329, Sec. 2018, 1913 Ed.

"The theory underlying the doctrine of local assessments of the first type (local improvement) which is held by the great majority of the courts, is that the value of certain property is enhanced by improvement of a public character, the property thus receiving a special and peculiar benefit; that upon such property a part or a whole of the cost of such public improvement is assessed to an amount not exceeding the amount of such benefits. The owner of the property is therefore under this theory no poorer by reason of the entire transaction, as the assessment only takes from him the equivalent, or part, or all of the public benefit which the public improvement has conferred upon him; or to state it another way, the special benefits conferred upon him by the public improvement compensate him or more than compensate him for the amount of the assessment which he is obliged to pay."

1 Page and Jones on Taxation by Assessment, p. 16, Sec. 11, 1909 Ed.

"A special assessment is in the nature of a tax upon property levied according to benefits conferred upon the property. The whole theory of a special assessment is based on the doctrine that the property against which it is levied derives some special benefit from the improvements. The justice of demanding the special contribution is supposed to be evidenced in the

> fact that the parties who are to make it, while they are to bear the cost of the public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay."
>
> *1 Cooley on Taxation,* pp. 105-6, Sec. 31, 4th Ed.

Ordinarily, property of like kind and quality and similarly situated within the same political subdivision must be taxed at a uniform rate. An act of legislature, which would tax one piece of property in a certain political subdivision at a rate different from that imposed on a neighboring piece of property of the same kind and quality in the same political subdivision, would be unconstitutional by reason of the fact that it would deprive the person of property without due process of law and would deny him the equal protection of the laws.

> *Hopkins, Assessor, et al., v. Southern California Telephone Co. et al.,* 275 U. S. 393; 72 L. Ed. 329; 48 Sup. Ct. 180.
>
> *Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441; 67 L. Ed. 340; 43 Sup. Ct. 190; 28 A. L. R. 979.

An exception to this rule, or not coming within its operation, is where property receives a special

or peculiar benefit from a public improvement. Where such is the case, it may be taxed for the purpose of paying the cost of that improvement and the fact that it is taxed at a rate different from other property of like kind and quality in the same political subdivision is justified on the ground that it is specially benefited.

Hagar v. Reclamation District No. 108, 111 U. S. 701; 28 L. Ed. 569; 4 Sup. Ct. 664.

Fallbrook Irrigation District v. Bradley, 164 U. S. 112; 41 L. Ed. 369; 17 Sup. Ct. 56.

Norwood v. Baker, 172 U. S. 269; 19 Sup. Ct. 187; 43 L. Ed. 443.

Board of Directors of the Middle Kittitas Irrigation District v. Peterson, 4 Wash. 147; 29 Pac. 995.

B. Maximum Amount of Special Assessment Levy Limited to Maximum Benefit Conferred on Land Assessed.

Since the levy of any special assessment is justified only on the theory of special benefit, it necessarily follows that the maximum amount of such a levy is limited to the maximum benefit conferred on the land assessed, and a levy in excess thereof constitutes a taking of property without due process of law.

The practice of levying special assessments, while infrequently employed in the early history of our country, became more and more prevalent as the advantages of this method of financing public improvements became manifest. Land for parks was acquired and improved, streets and sidewalks paved, swamps drained, dikes erected, irrigation systems developed, and even railroad tunnels constructed and the cost thereof imposed on the land benefited. Generally, the courts upheld the action of the legislature where the improvement was public in its nature and where the cost was apportioned in accordance with and limited to benefits. However, the very nature of the power suggested the possibilities of its abuse. Reason alone indicated that there must be some limitation and it was the action of a small town in Ohio which gave rise to a case which definitely and conclusively prescribed the limitations of that power.

The Ohio statutes permitted lands to be condemned for highways and streets and permitted the cost to be put on the general tax list or in proportion to the benefits derived from the improvements or by value of the front foot on abutting properties. The city proceeded to condemn a strip of land through the plaintiff's property. The plaintiff's land was

the only property abutting on this street that was condemned. The sum of $2,000 was awarded and paid to the plaintiff. The city concil then proceeded to levy an assessment for the cost of condemning the land in accordance with a front foot rule. In view of the fact that the plaintiff's land was the only land abutting on this street, the assessment applied only to him. The owner contested the validity of this assessment on the theory that it was an attempt to deprive him of property without due process of law. In upholding his contention, this Court said:

> "In our judgment the exaction from the owner of private property of the cost of public improvement in substantial excess of the special benefits accruing to him, is, *to the extent of such excess,* a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess' because exact equality of taxation is not always obtainable and, for that reason, the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment." (Italics ours.)
>
> *Norwood v. Baker,* 172 U. S. 269, 279; 19 Sup. Ct. 187; 43 L. Ed. 443.

This case has been cited and applied many times for the principle it states, and, while held inap-

plicable to the facts presented in certain cases, the Supreme Court of the United States has never indicated any limitation on the principle therein announced nor modified the language employed. The principle of *Norwood v. Baker, supra,* has been applied by this Court in the following cases:

Gast Realty and Investment Co. v. Schneider Granite Co., 240 U. S. 55; 60 L. Ed. 523; 36 Sup. Ct. 254.

Martin v. District of Columbia, 205 U. S. 135; 51 L. Ed. 743; 27 Sup. Ct. 440.

Hagar v. Reclamation District No. 108, 111 U. S. 701; 28 L. Ed. 569; 4 Sup. Ct. 663.

Myles Salt Co. Inc. v. Board of Commissioners of the Iberia & St. Mary Drainage District, 239 U. S. 478; 60 L. Ed. 392; 36 Sup. Ct. 204; L. R. A. 1918 E. 190.

Phillip Wagner, Incorporated, v. Leser et al., 239 U. S. 207; 60 L. Ed. 230; 36 Sup. Ct. 66.

The line of thought running throughout all of these cases is that the State Legislature has a wide discretion in apportioning the costs of improvements on the lands benefited, or establishing a rule whereby they may be apportioned by a public body to whom that function is delegated, and, unless the deter-

mination so made or the rule prescribed is unjust and arbitrary, the method of apportioning the costs will be conclusive, so long as the assessment apportioned against any particular piece of land is not in substantial excess of the benefits conferred thereon. The results of the various decisions are summarized by McQuillin in his book on Municipal Corporations:

> "The rule that a method of assessment cannot be arbitrary and must have some relation to the benefits appears reasonable. It would seem that the legislature is competent to judge of the benefits. This is assumed by the current of authority. A public improvement having been made, the question of determining the area benefited by such improvement is generally held to be a legislative function and such legislative determination, unless palpably unjust, is usually conclusive. *The prohibition is that assessments shall not be levied in excess of the benefits conferred whether by the valuation, front foot, area, or any other method.*" (Italics ours.)
>
> 5 *McQuillin on Municipal Corporations*, p. 4331, Sec. 2018, 1913 Ed.

The results of the decisions are summarized by another author in the following language:

> "In theory at least it is held in the great majority of jurisdictions that an assessment must be apportioned according to the benefits

conferred by the improvement for which such assessment is levied, *and must not in any case be in substantial excess of such benefits.* As has already been said, the courts are not in harmony as to the constitutional principle which is applicable in limiting assessments to benefits conferred. The great weight of authority, however, is that which forbids taking of property without due process of law. If the assessment does not exceed the amount of benefits conferred by the improvement for which such assessment is levied and is apportioned according to such benefits, it is not objectionable as a violation of the constitutional provision under discussion. If the assessment is not apportioned in substantially the same ratio as the benefits, *or if it is substantially in excess thereof, such assessment is invalid as amounting to a taking of property without due process of law.*" (Italics ours.)

1 Page and Jones on Taxation by Assessment, p. 197, Sec. 118, 1909 Ed.

A review of the cases decided in the various states reveals the fact that they have almost without exception followed the rule laid down in *Norwood v. Baker,* 172 U. S. 269; 19 Sup. Ct. 187; 43 L. Ed. 443.

Iowa Pipe & Tile Co. v. Callahan, 125 Iowa 358; 101 N. W. 141; 106 A. S. R. 311; 3 Ann. Cas. 7; 67 L. R. A. 408.

Sears v. Board of Aldermen of Boston et al., 173 Mass. 71; 53 N. E. 138; 43 L. R. A. 834.

Corcoran et al. v. Board of Aldermen of Cambridge, et al., 199 Mass. 5; 85 N. E. 155; 18 L. R. A. (N. S.) 187.

Power v. City of Helena, 43 Mont. 336; 116 Pac. 415; 36 L. R. A. (N. S.) 39.

Tidewater Co. v. Coster, 18 N. J. Eq. 518; 90 Am. Dec. 634.

The Washington Court itself, in line with the great majority of the state courts, has cited *Norwood v. Baker, supra,* and adopted the principles of law therein set forth. In considering the power of the county commissioners to assess for drainage purposes, the court said:

> "Both by the statute under which the commissioners acted and by the fundamental law, the commissioners were without power to assess against the land a greater sum than the amount of the benefits the improvement conferred upon them."

State ex rel. Espy Estate v. Board of Commissioners of Pacific County, 48 Wash. 230, 232; 93 Pac. 326, 327.

In another case involving the validity of drainage assessments, this principle of law was recognized and applied. The Washington drainage statute provides for an ascertainment of maximum benefits. An attempt was made to levy an assessment in ex-

cess of the benefits. In holding that the commissioners had no such power, the court said:

> " * * * However, we are of the opinion that the act does not contemplate a reascertainment or a subsequent fixing of the amount of the benefits accruing to the property by reason of the original construction of the improvement; but that it merely confers upon the district the right to make supplemental assessments to pay for the cost of constructing the original improvement, provided the amount of the deficiency plus the amount of the assessment made in the original proceeding, does not exceed the amount of the maximum benefits as originally fixed and determined by the jury. * * *
>
> "This construction of the statute must be preferred in view of the well settled canon of construction that, where a statute is open to two constructions, one of which will render it constitutional, the other of which will render it unconstitutional, the former and not the latter is the construction to be adopted."

Poolman et al. v. Langdon et al., 94 Wash. 448, 457; 162 Pac. 578, 581.

In a similar case the appellants contended that the power of reassessment deprived them of property without due process of law. The Court said:

> " * * * When it comes to charging the cost of the improvement against the several tracts of land within the district, such charge must be 'in proportion to the benefits accruing thereto,'

and we think that statute also means that no tract of land can be charged in excess of the benefits accruing thereto."

Foster v. Commissioners of Cowlitz County et al., 100 Wash. 502, 512; 171 Pac. 539, 542.

In another Washington case the question was raised as to whether property within a waterway district was liable to assessment in an amount in excess of the maximum benefits. In that case we find the Washington Supreme Court saying:

"Keeping in mind, then, that the expense and cost of all public works may be charged to property benefited, it is fundamental that no greater charge can be made than a sum equal to the benefits received; for, if a charge be made over and above the benefit to the property, it is a taking of property without just compensation and violates Article I, Section 16, of the Bill of Rights."

Behrens v. Commercial Waterway District No. 1 of King County, 107 Wash. 155, 157; 181 Pac. 892, 893.

Again, in a very recent case, this same principle was announced:

"It is fundamental that no greater exaction can be made than a sum equal to the benefits received; for, if a charge be made over and above the benefits to the property, it is the taking of property without just compensation

and violates Article 1, Section 16, Washington Constitution."

Perkins & Co. v. Diking District No. 3 of Island County et al., 162 Wash. 227, 233; 298 Pac. 462, 464.

See also:

Boyd et al. v. Cunningham et al., 164 Wash. 335; 2 Pac. (2d) 647.

That these decisions are pertinent to a discussion of the irrigation district law of the State of Washington is shown by the following declaration from the case of the *Board of Directors of Modesto Irrigation District v. Tregea,* 88 Cal. 334; 26 Pac. 237, quoted with approval by this Court in the case of *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112, 173; 41 L. Ed. 369; 17 Sup. Ct. 56:

> " 'The formation of irrigation districts is accomplished by proceedings so closely analogous to those prescribed for the formation of swamp-land reclamation districts that the decisions with respect to the latter are authority as to the former, * * *.' "

The foregoing citations serve to illustrate how generally the principle announced in *Norwood v. Baker,* 172 U. S. 269; 19 Sup. Ct. 187; 43 L. Ed. 443, has been recognized and applied. Further, au-

thority is not lacking with respect to its application to irrigation district assessments.

The Colorado court, in considering the rights of the Board of Directors of an irrigation district to levy an amount to cover the delinquencies arising on other lands, said:

> "* * * To hold that one owner is liable for the assessments due for benefits conferred upon the land of his neighbor would be violative of both State and Federal constitutions, and for this reason alone the argument against the contention of Plaintiff should be conclusive. A construction of this act which charges the property of a faithful few with the payment of the entire cost of the project is manifestly contrary to the purpose and spirit of the act and cannot be legally upheld on any theory. Such a rule would be fundamentally wrong, and subversive of every legal principle governing assessments for local improvements."
>
> *Interstate Trust Co. v. Montezuma Valley Irrigation District et al.*, 66 Colo. 219; 181 Pac. 123, 125.

The Nebraska court, in considering the power of an irrigation district to levy assessments against property not benefited, said:

> "An irrigation district is a public corporation, but not a municipal corporation. * * * Unless it is clearly shown or indisputedly established that the result of its action will exact

from the owner of private property within the district a sum in substantial excess of the special benefits accruing to him, he is not entitled to complain. To quote from *Norwood v. Baker,* 172 U. S. 269; 19 Sup. Ct. 187; 43 L. Ed. 443:

> 'We say "substantial excess" because exact equality of taxation is not always obtainable and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment.'
>
> '"* * * but it must be remembered that the assessments made upon the property in the district, although made by valuation, and not by acreage, foot frontage, or other rule, are special assessments, and must be levied upon the real estate in proportion to the special benefits received."

Erickson v. Nine Mile Irrigation District et al., 109 Neb. 189; 190 N. W. 573, 575.

Of special significance is a recent decision of the Supreme Court of Montana. In 1925 the Montana Supreme Court in the case of *Cosman v. Chestnut Valley Irrigation District et al.,* 74 Mont. 111; 238 Pac. 879; 40 A. L. R. 1344, held that bonds issued by the district were the general obligation of the district and that there was no limit to the liability of the lands in the district. After a number of years of sad experience with the vicious

effect of this principle, a case was recently submitted to that court in which it was contended that under the principle announced in *Norwood v. Baker, supra,* the rule previously followed by that court with respect to irrigation district assessments was unconstitutional and should be overruled.

The court lent its ear to this contention and after considering the true nature of the levy made by an irrigation district, expressly overruled its earlier decision. The following language of the court is quoted:

> "The impositions imposed upon the lands within an irrigation district for the purpose of irrigating the lands therein are special assessments. * * *
>
> "* * * The theory upon which assessments may be levied for special improvements is 'that the property assessed will be enhanced (in value) to the extent of the burden imposed.' * * *
>
> "If the sole justification for placing an additional burden upon a given tract of land is the benefits accruing to that tract of land, then it must follow that any exaction from the owner of that land of any amount substantially exceeding the value of such benefits is to that extent the taking of private property for an alleged public use without compensation. * * *"
>
> *State ex rel. Mallott v. Board of Commissioners of Cascade County et al.,* (Mont.) 296 Pac. 1, 14,

and on page 18:

> "We are satisfied that the rule heretofore announced by this court to the effect that bonds issued by an irrigation district constitute general obligations of that district is erroneous. We are further satisfied that less injury will result from overruling rather than following the doctrine as last above announced; and therefore, the former holding of this court to the effect that such bonds constitute general obligations is overruled. It follows that the lien of the bonds is extinguished by the tax deed to the county, and that the purchaser from the county takes title free and clear of the lien of the bonds. Further, that the bonds are not general obligations of the irrigation district, but are a charge against the lands within the district, and that delinquent assessments for the payment of the bonds and interest may not be included in future assessments made against the other lands of the district."

The action of the Supreme Court of Montana is of special significance, not only as a correct statement of the law, but also as a judicial recognition that as a matter of fact less injury will result from a limited liability theory than from an unlimited liability theory.

It can be seen from the foregoing that the principle of *Norwood v. Baker*, 172 U. S. 269; 19 Sup. Ct. 187; 43 L. Ed. 443, has been given universal application, although the Supreme Court of the

State of Washington has cited the following cases as holding to the contrary:

> *Cosman v. Chestnut Valley Irrigation District et al.*, 74 Mont. 111; 238 Pac. 879; 40 A. L. R. 1344.
>
> *Stevens et al. v. Melville et al.*, 52 Utah 524; 175 Pac. 602.
>
> *Norris et al. v. Montezuma Valley Irrigation District et al.*, 248 Fed. 369.

A cursory reading of the opinions in these cases demonstrates that they do not in fact do so.

Cosman v. Chestnut Valley Irrigation District et al., 74 Mont. 111; 238 Pac. 879; 40 A. L. R. 1344, has since been overruled by *State ex rel. Mallott v. Board of County Commissioners*, 89 Mont. 37; 296 Pac. 1, upon the authority of *Norwood v. Baker*, 172 U. S. 269; 19 Sup. Ct. 187; 43 L. Ed. 443, and the constitutional grounds urged by the Appellant herein.

The case of *Stevens et al. v. Melville et al.*, 52 Utah 524, 175 Pac. 602, was an action to confirm proceedings incident to the organization of an irrigation district and the issuance of bonds subsequent thereto. It was held that the provisions of the Utah statute authorizing a levy for anticipated defaults were constitutional. On that question the

decision of the court went no further. In a later case brought by an individual landowner, for the purpose of preventing a threatened levy, the Utah Supreme Court pointed out that the Utah Legislature had incorporated the theory of limited liability in the statutes:

> "Moreover, the general spirit of the entire Act seems to negative the claim or argument that it was intended by the Legislature that the indebtedness should be an obligation chargeable against all of the property in the district, as a general municipal liability."
>
> *Nelson v. Board of Commissioners of Davis County et al.,* (Utah) 218 Pac. 952, 953.

For this reason the Utah Supreme Court can hardly be quoted as having held contrary to the general principles of law laid down in *Norwood v. Baker,* 172 U. S. 169; 19 Sup. Ct. 187; 43 L. Ed. 443.

The case of *Norris et al. v. Montezuma Valley Irrigation District,* 248 Fed. 369, arose in the District Court for Colorado, reported in 240 Fed. 825, and the trial court, in its opinion, held that the liability of lands within an irrigation district was limited to the benefits conferred thereon. The Circuit Court of Appeals, as reported in 248 Fed. 369, reversed the holding of the District Court by a two to one decision. However, the majority opinion

points out that this was a controversy between the bondholders and the District, and that the rights of an individual landowner in the District were not raised.

On page 373:

> "* * * The objection is not made by any taxpayer claiming to have paid his full share of the prior levy, but is made by the Defendants in error, the Irrigation District, the Board of County Commissioners, and the County Treasurer."

In considering the holding of the Circuit Court of Appeals in said case, attention should be directed to the logic of the dissenting opinion of District Judge Amidon, in 248 Fed. 369, 375, and the fact that the Colorado Supreme Court, about one year later, held in accordance with the reasoning of and conclusions in said dissenting opinion.

> *Inter-State Trust Company v. Montezuma Valley Irrigation District et al.*, 66 Col. 219; 181 Pac. 123.

In *Kadow et al. v. Paul et al.*, 274 U. S. 175, 181; 71 L. Ed. 982; 47 Sup. Ct. 561, this Court recognized the limitations to be placed upon the opinion of the Circuit Court of Appeals in *Norris et al. v. Montezuma Valley Irrigation District et al.*, 248

Fed. 369, by citing said case in support of the following statement of this Court:

> "* * * When the operation of the law works uniformly as against all parts of the assessment district, and results in a higher cost of the improvement and an increased assessment on all the owners of lands who have paid, *it violates no constitutional rights of theirs as long as their benefits continue respectively to exceed their individual assessments.*" (Italics ours.)

IV.

THAT THE WASHINGTON IRRIGATION DISTRICT STATUTE AS CONSTRUED AND APPLIED BY THE SUPREME COURT OF THAT STATE, IN THE INSTANT CASE, AUTHORIZED A LEVY OF SPECIAL ASSESSMENTS AGAINST A TRACT OF LAND FOR LOCAL IMPROVEMENTS IN SUBSTANTIAL EXCESS OF THE BENEFITS ACCRUING TO SUCH LAND BY REASON OF THE IMPROVEMENTS; AND, AS SO CONSTRUED AND APPLIED, CONTRAVENES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In the light of the foregoing citations and extended research, we assert that whenever due consideration has been given to the nature of a special assessment and the theory on which it is justified, there is no judicial dissent from the proposition

that individual assessments may not be levied in excess of maximum individual benefits. These principles have been given general application, to irrigation district assessments, by the Courts of last resort in states having irrigation district laws.

The Supreme Court of the State of Washington has repeatedly held irrigation assessments to be special assessments, and a holding that they are special assessments is essential to the validity of the irrigation district law under the Constitution of the State of Washington. Yet in the face of these facts we find that, under the decisions of the Supreme Court of the State of Washington, judicial approval is given a mode of assessment which in the operation does authorize a levy by an irrigation district in an unlimited amount.

The allegations set forth in the complaint clearly show facts demonstrating the application of this mode of assessment. The Appellant is helpless and without remedy if it be sanctioned. There is no question as to the meaning of the Washington decisions, and, regardless of what defense they may offer, the Appellees cannot deny that the accepted view of the Washington decisions is that they authorize and sanction the levy of irrigation district special assessments without limit and in an

amount substantially exceeding any individual benefits. The Appellant challenges the correctness of this theory and believes that a protection against the operation of such a theory lies in the guaranties afforded by the Fourteenth Amendment to the Federal Constitution.

A. Analysis of the Decisions of the Supreme Court of the State of Washington Which Lay Down the Theory That Irrigation District Special Assessments May Be Unlimited in Amount.

The case of *State ex rel. Clancy et al. v. Columbia Irrigation District of Stevens County et al,* 121 Wash. 79; 208 Pac. 27, is cited in the opinion of the Supreme Court of the State of Washington, in the case on appeal herein, *Roberts v. Richland Irrigation District et al.,* 69 Wash. Dec. 108, 112; 13 Pac. (2d) 437, 439. (R. 25.), and in the opinion of *State ex rel. Wells v. Hartung et al.,* 150 Wash. 590, 599; 274 Pac. 181, 184, in support of the proposition that irrigation district special assessments can be made without limit.

A careful reading of the opinion of the Court in the case of *State ex rel. Clancy et al. v. Columbia Irrigation District et al., supra,* leads to the following analysis: The Plaintiffs, holders of bonds and

interest coupons past due, applied for a preemptory writ of mandate directed to the Columbia Irrigation District and the County Commissioners and County Treasurer of Stevens County, to compel a levy upon all lands in the district in an amount sufficient to meet payments of bond interest and principal as they came due. In holding that the plaintiffs were entitled to the relief prayed for, it was held, first, that an irrigation district is a municipal corporation when it is considered in relation to its contracts made in the manner prescribed by law; second, the bonds issued by an irrigation district, since they contain an absolute promise to pay, are a general obligation, and hence all the land within the district may be assessed for the payment of the obligation; third, lands acquired by the county are subject to future assessments; fourth, lands acquired by the district are subject to future assessments; fifth, each and every tract within the district is liable for the payment of all the principal and interest due on the outstanding bonds; sixth, the law in force at the time of levying the assessment controlled; seventh, it was not necessary for the bondholders to first resort to the specific lien given by Remington's Revised Statutes, Sec. 7434 (Appendix v.), before applying for a writ of mandate to compel an assessment.

Insofar as consideration of the foregoing legal proposition was necessary to dispose of the issues actually presented, it is not necessary to discuss them here. Insofar as the opinion holds that individual special assessments may be made in excess of individual benefits, it is pure *dicta*. The facts before the Court did not raise the question. We quote from the brief of *Amici Curiae*, L. L. Thompson, Attorney General, and Fred J. Cunningham, Assistant Attorney General:

> "It should be noted that no private property owner, so far as the record shows, has made any objection to the assessments involved herein, nor is the irrigation district contesting the writ of mandamus granted by the trial court. This case involves a contest between the bondholders and the county. * * * The only issues involved in this appeal, then, are those relating to the manner in which assessments should be made and levied by the district and county officials, the amount thereof where the private property owner is not objecting, and the lands which should be included in making and levying such assessments."

A reading of the opinion confirms this statement. There is no evidence before the Court that a threatened individual assessment would exceed the benefit to any particular tract of land, and the statement that each tract of land was liable for the full bonded indebtedness was *dicta*.

The reasoning of the case is this: The bonds of the district, upon their face, contain an absolute promise to pay. They are, therefore, the general obligations of the district, consequently it may levy unlimited assessments for their payment. Hence, these assessments may be levied in excess of benefits.

The fallacy of the Court's reasoning is obvious. Even if it be conceded that the bonds are "the general obligations" of the district, in the sense that they contain an absolute promise to pay, it does not follow that they are the general obligation of each particular tract of land in the district. The district and the landowner are separate entities. The bonds are the general obligation of the district. They are not the obligation of the landowner in any sense. The relationship existing between the bondholders and the district is contractual. The individual landowner is not a party to that contract. It is not the basis of his liability, which is a tax liability justified only by the benefits he actually receives. The Federal constitution is one of the terms of each bond. For the purpose of meeting its obligations, the district is given the authority, under the statute and in conformity with the Federal constitution, to levy special assessments on the lands benefited, but that power does not extend

beyond the provisions of the statute and the constitutional limits thereon. Insofar as the district has unencumbered assets and the power to levy special assessments, it may be required to exhaust them to meet its obligations, but, when the district has exhausted its right to levy special assessments, it must thereafter meet its obligations from assets other than assessments, such as foreclosed land. When all other resources have been exhausted, the district occupies exactly the same position as any other insolvent debtor. The fact that the district cannot meet its obligations does not justify the invasion of the constitutional rights of the individual landowner who has paid the full amount of his benefit.

The assumption, that the power to issue a general obligation, namely, an absolute promise to pay, imports the power to levy unlimited assessments, is obviously fallacious. The statutory authority to a district to issue an absolute promise to pay cannot abrogate the pertinent provisions of the Federal constitution, and create the power to levy unlimited special assessments. The nature of the tax is determined by the functioning of the taxing unit. When its only function is the benefiting of private land by

a cooperative public improvement, its only power to tax is that of special assessment.

The evident source of the Court's error is its failure to take cognizance of the constitutional fundamentals announced in *Norwood v. Baker,* 172 U. S. 269; 19 Sup. Ct. 187; 43 L. Ed. 443, and its attempt to substitute therefor the assumption that the statutory authorization to issue an absolute promise to pay conferred the power to levy unlimited special assessments.

The case of *State ex rel. Wells v. Hartung et al.,* 150 Wash. 590; 274 Pac. 181, is cited in the opinion of the Supreme Court of the State of Washington, in the instant case, as a binding precedent.

> *Roberts v. Richland Irrigation District et al.,* 69 Wash. Dec. 108, 115; 13 Pac. (2d) 437, 440 (R. 29.).

We therefore feel obligated to discuss its pertinent paragraphs.

In that case the bondholders brought an action to compel a levy sufficient to meet the maturing obligations of the district. A landowner intervened, urging the proposition that an assessment could not be made on his land in excess of benefits. The court sustained the contention of the bondholders and held

that assessments could be levied in excess of benefits, a holding based upon the precedent and the legal and logical fallacy of *State ex rel. Clancy v. Columbia Irrigation District of Stevens County,* 121 Wash. 79; 208 Pac. 27.

The court, in *State ex rel. Wells v. Hartung et al.,* 150 Wash. 590, 598; 274 Pac. 181, 184, states the contention of the Appellant to be:

> " * * * that no lands can be subjected to any additional liability than the amount of the benefits to such lands or the statute would be unconstitutional."

It answers this argument with the statement:

> "This Court has determined the constitutionality of such organization acts, upholding their validity. *Board of Directors of the Middle Kittitas Irrigation District v. Peterson,* 4 Wash. 147; 29 Pac. 995; *State ex rel. Witherop v. Brown,* 19 Wash. 383; 53 Pac. 548; *Kinkade v. Witherop,* 29 Wash. 10; 69 Pac. 399."

The answer of the court in said case does not meet the argument of the Appellant therein.

The fact that the constitutionality of a legislative act has been upheld as against one objection does not mean that it may not thereafter be held vulnerable as against other and different constitutional objections. The fact that the general plan

and theory of the irrigation district laws, including the granting of the power to levy assessments, has constitutional sanction does not mean that any and every method of exercising the granted power is constitutional. The cases cited go no farther than to hold that it is competent for the Legislature of the State of Washington to create public corporations for the making of private improvements, and to pay for such improvements through the levy of special assessments.

The question presented in *State ex rel. Wells v. Hartung et al., supra,* and in this case was not presented by the records of nor discussed in any of the cited cases in the above quotation from *State ex rel. Wells v .Hartung et al., supra.*

In this case and in the case of *State ex rel. Wells v. Hartung et al., supra,* a question is raised as to the constitutionality of the manner and extent of the exercise of an admittedly existing power of assessment. The statute creating an irrigation district may be constitutional. It may create an unquestioned right to exercise the power of assessment, but the extent to which that power is exercised in any given case is always open to judicial review.

It is next said, in *State ex rel. Wells v. Hart-*

ung et al., supra, at p. 598 of 150 Wash. and p. 184 of 274 Pac.:

> "A hearing having been provided, after notice, as to the organization, boundaries of and inclusion of lands to be benefited within the district to be organized (Remington's Compiled Statutes, Section 7418), such procedure is universally declared constitutional. *Kinkade v. Witherop,* 29 Wash. 10, 69 Pac. 399; *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112."

In neither of the cases cited in the above quotation was the constitutional question, herein raised, presented or considered.

The sole question presented by this appeal is:

DOES INDIVIDUAL MAXIMUM BENEFIT LIMIT INDIVIDUAL LIABILITY TO PAY ON THE PART OF A LANDOWNER SUBJECT TO SPECIAL ASSESSMENTS IN AN IRRIGATION DISTRICT?

This question was not presented by the facts in *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112, 41 L. Ed. 369, 17 Sup. Ct. 56, nor is it specifically decided, though the decision in that case, as stated on page 176 in 164 U. S., rests upon the assumption that

> "Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the

> latter. * * * Assuming that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received and that no land ought in justice to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry."

This assumption was subsequently held by the Supreme Court of California to constitute a binding construction of the Wright Act.

> *Miller & Lux Inc. v. Board of Supervisors of Madera County et al.,* 189 Cal. 254; 208 Pac. 304.

It thus appears that the citations of precedent in the case of *State ex rel. Wells v. Hartung et al., supra,* go no further than to substantiate propositions which were not questioned therein, and to sustain the constitutionality of the irrigation act in certain respects in which it was not attacked but which do not touch the question actually presented, to-wit: the power of the district to levy individual special assessments in excess of individual benefits.

On this question the State Supreme Court relies, in this case, exclusively upon the following logic set forth in *State ex rel. Wells v. Hartung et al.,* 150 Wash. 590, 600; 274 Pac. 181, 185:

> "It must be conclusively presumed from the due adjudication of the organization of the district in 1918 determining the lands to be therein included, the amount of bonds to be issued and the interest to be paid thereon, that the total benefits to the lands comprised in the district were then finally adjudicated. Each tract of land within the district then became generally liable for the payment of the bonds and interest."

The foregoing quotation states the so-called "last faithful acre doctrine." It is obviously fallacious as there is no logical connection between the facts recited in the first sentence and the conclusion drawn in the last sentence. If it is meant thereby to hold that the adjudication of aggregate benefits is an adjudication of individual benefits it is in direct conflict with *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112; 17 Sup. Ct. 56; 41 L. Ed. 369.

Assuming that a hearing for the determination of total benefits is *res adjudicata* on the question of total benefits, does it bind the individual landowner as a determination of the benefit to his tract in the full amount of the aggregate benefit? Such a conclusion is mathematically impossible. It is also impossible, for the reason that the statute makes no provision for a consideration of individual benefits at this hearing.

> " * * * The opinion overlooks the fact that no attempt is made to segregate the obligation at the time it is created, and in fact there is no provision made in the Act for segregation at any time. The Acts by their terms bind the districts as a whole to pay their obligations. * * * "
>
> *State ex rel. Clancy v. Columbia Irrigation District of Stevens County et al.,* 121 Wash. 77, 87; 208 Pac. 27, 30.

The judgment referred to in the above quoted paragraph from *State ex rel. Wells v. Hartung et al., supra,* goes no further than to adjudicate that the irrigation district is a legally constituted public corporation, endowed with certain functions including the power to levy special assessments in a determined aggregate and in a constitutional manner against all the lands within its boundaries. It does not adjudicate in what amounts the individual tracts are benefited. How then can it determine the maximum individual liability of the lands benefited?

The Supreme Court of the United States, in *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112; 41 L. Ed. 369; 17 Sup. Ct. 56, had occasion to make an observation on the distinction between an adjudication approving the district's organization and the inclusion of the respective lands therein,

and an adjudication involving the amount of benefits to each particular tract of land. Far from holding that an adjudication of aggregate benefits on confirmation constituted an adjudication of maximum individual liability, this Court specifically holds that a subsequent allocation of benefits is a constitutional necessity and *that the amount so allocated limits individual liability to pay.*

> " * * * The Legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, i. e. *the amount of the tax which he is to pay. Paulsen v. Portland,* 149 U. S. 30, 41. * * * " (Italics ours.)

Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 174; 17 Sup. Ct. 56; 41 L. Ed. 369.

In *State ex rel. Clancy v. Columbia Irrigation District of Stevens County et al.,* 121 Wash. 77; 208 Pac. 27, it is held that the irrigation district statute neither provides for, nor contemplates a segregation of the obligation. In *State ex rel. Wells v. Hartung et al.,* 150 Wash. 590; 274 Pac. 181, it is held that

the determination of the aggregate benefits to the district automatically determines the maximum liability of each acre. In the case on appeal herein, the Supreme Court of the State of Washington said that, since Remington's Revised Statutes, Sections 7438, 7439 and 7440, provide for an annual equalization of the tax (Appendix vii.),

> " * * * Patently there is no denial of the right of the landowner to a hearing upon the amount of his assessment."
>
> *Roberts v. Richland Irrigation District et al.*, 69 Wash. Dec. 108, 113; 13 Pac. (2d) 437, 439. (R. 27.)

We shall not attempt to reconcile these statements. *Our whole contention and our only contention is that the statute, by express terms, and the Supreme Court of the State of Washington, by its decisions, have expressly authorized the district to disregard maximum individual benefit, however fixed, and levy assessments without limit.*

Whatever confusion there may be in the decisions of the State Supreme Court on other points, there is an absolute unanimity in *State ex rel. Clancy v. Columbia Irrigation District of Stevens County et al., supra; State ex rel. Wells v. Hartung et al., supra,* and the instant case, in holding that,

no matter how fixed, individual benefits do not limit individual assessments, and the maximum individual liability is measured only by the bonded debt. It is this holding which we contend so construes and applies the irrigation district statute as to deprive Appellant of his property without due process of law.

We submit, therefore, that the levy described in Appellant's complaint cannot be justified as a general tax under the decisions of the Supreme Court of the State of Washington. It is not levied for any governmental purpose, nor by a body exercising any governmental functions. It cannot be justified as a special assessment, for the reason that it authorizes the taxing authorities to disregard the maximum individual benefit and levy assessments in substantial excess thereof.

B. Analysis of the Opinion of the State Supreme Court in the Case On Appeal.

The Supreme Court of the State of Washington, in the case on appeal herein, said in its opinion:

> " * * * Lands acquired by the district for unpaid assessments are assets of the district. An added benefit therefrom accrues to the district as a whole and to each landowner individually. Such benefit is a basis, as are the unpaid assessments on other lands within the

district, for the secondary liability to which reference is made in *State ex rel. Wells v. Hartung.*"

Roberts v. Richland Irrigation District et al., 69 Wash. Dec. 108, 113; 13 Pac. (2d) 437, 439. (R. 27.)

The fallacies in this statement are obvious:

1. It is negatived as a matter of fact by the affirmative allegations in the complaint, admitted by the demurrers, that all benefits accruing to the Appellant amounted to a certain sum and that said sum has been paid. (R. 4, 5, 6.) If acquired lands constitute a benefit, it is admitted that that benefit, together with all benefits accruing to the land of Appellant, has heretofore been paid by Appellant. (R. 4.) It is further alleged that said levy is intentionally made without regard to benefits but is based solely on a consideration of the bond requirements. (R. 6.)

2. Legally it is impossible for this Appellant to be "benefited" by lands acquired by the district for unpaid assessments *after he has paid the full amount of benefits accruing to his land.* Sections 7443 to 7445, inclusive, Remington's Revised Statutes of Washington, provide that such lands shall be sold by the district. (Appendix ix.) Section 7434

of Remington's Revised Statutes of Washington states that funds arising from their sale shall be used for the payment of outstanding bonds. (Appendix v.) There is no provision under the statute whereby the "faithful" landowner acquires any portion of those lands, nor any portion of the monies arising from their sale, nor may they be used for further improvement.

3. Further, said sections 7443 to 7445, inclusive, provide that these lands may be sold for their reasonable market value. If that figure is less than the amount of the assessment against them, there will be a deficit, which, under the theory in this case, may be re-assessed against the landowner who has already paid his maximum benefit. How can such added levy constitute an added benefit to the faithful landowner?

Assume, however, that these lands will all be sold for an amount in excess of the assessments against them. The monies arising from the sale are the property of the district and must be applied upon the bonds. No portion of it is ever returned to the individual landowner. The only effect of such payment would be to reduce the number of subsequent assessments in excess of benefits thereafter made against the faithful landowner who has

paid his maximum. If any assessment in excess of the benefit accruing to him by reason of the erection of the improvement is unconstitutional and void, then the only effect of a sale of these lands for an amount in excess of the delinquent assessment would be to reduce the number and amount of illegal levies. How can it be said that he can be benefited by the reduction or the elimination of an assessment, no part of which he is legally obligated to pay?

The idea that acquired lands constitute an added benefit originated in the case of *Cosman v. Chestnut Valley Irrigation District et al.*, 74 Mont. 111; 238 Pac. 879; 40 A. L. R. 1344. Its fallacy is unequivocally acknowledged by the Supreme Court of the State of Montana in the case of *State ex rel. Malott et al. v. Board of Commissioners of Cascade County et al.*, 89 Mont. 37; 296 Pac. 1, 15, in the following language:

> "The holding in the *Cosman* case to the effect that these bonds are general obligations of the district was based upon the assumption that, when the lands were sold, they would bring an amount equaling or exceeding the amount of the delinquencies. As hereinbefore noted, that law has since been amended, so that these lands may now be sold for their fair market value. We have noticed that this change in the law may be made without violating the obligation of the contract with the

bondholders. As pointed out in the *Cosman* case, if the lands upon which there are delinquencies are sold for an amount equaling the taxes and assessments, then the faithful assessment payer suffers nothing more than a temporary disadvantage. The holding in that case did not contemplate that a sale of the land might be made for an amount less than the delinquencies."

We submit that the foregoing analysis demonstrates that the Washington decisions upon the subject are sustained by neither precedent nor principle, and are in direct conflict with the holdings of this court in:

Norwood v. Baker, 172 U. S. 269; 19 Sup. Ct. 187; 43 L. Ed. 443;

Fallbrook Irrigation District v. Bradley, 164 U. S. 112; 17 Sup. Ct. 56; 41 L. Ed. 369;

Kadow et al. v. Paul et al., 274 U. S. 175; 71 L. Ed. 982; 47 Sup. Ct. 561.

We further submit that, insofar as these Washington decisions construe and apply the Washington irrigation district statute, as in this case, to authorize a levy of special assessments against a tract of land for local improvements, in substantial excess of the benefits accruing to such land by reason of the improvements, the statute contravenes the due process

clause of the Fourteenth Amendment to the Constitution of the United States.

C. Analysis of the Case of Kadow Et Al. v. Paul Et Al.

The State Supreme Court herein cites the case of *Kadow et al. v. Paul et al.*, 274 U. S. 175; 71 L. Ed. 982; 47 Sup. Ct. 561, in support of the last faithful acre doctrine, as announced in *State ex rel. Wells v. Hartung et al.*, 150 Wash. 590; 274 Pac. 181.

> *Roberts v. Richland Irrigation District et al.*, 69 Wash. Dec. 108, 114; 13 Pac. (2d) 437, 440. (R. 28.)

A critical examination of the decision of *Kadow et al. v. Paul et al., supra,* is therefore necessary. We submit the following:

Remington's Revised Statutes, Section 4422, which deals with drainage and diking improvement districts, was enacted in its amended form in 1923 (Laws of Washington, 1923, Chap. 46, Sec. 7) and contains the following clause:

> "* * * and all the lands included within the boundaries of the district and assessed for the improvement shall be and remain liable for the costs of the improvement until the same are fully paid."

This provision is practically identical with the provision of our irrigation district statute, Remington's Revised Statutes, Section 7434, (Appendix v.), to-wit:

> "Said bonds and interest thereon * * * shall be paid by revenue derived from an annual assessment upon the real property of the district, *and all the real property in the district shall be and remain liable to be assessed for such payments until fully paid as hereinafter provided.*" (Italics ours.)

This section of the irrigation district statute is the one upon which the State Supreme Court, in its opinion herein, primarily rests its decision.

> *Roberts v. Richland Irrigation District et al.,* 69 Wash. Dec. 108, 112; 13 Pac. (2d) 437, 439. (R. 26.)

Certain landowners undertook to organize a diking improvement district under Remington's Revised Statutes of Washington, Sections 4405 to 4459, inclusive, (as they were amended by the Laws of Washington, 1923, Chapter 46). Certain other landowners brought an action to restrain the defendants from constructing the proposed improvement, and from issuing bonds in payment thereof. One of the contentions (*Kadow et al. v. Paul et al.,* 134 Wash. 539, 553; 236 Pac. 90, 95) was that Remington's Re-

vised Statutes of Washington, Section 4422, (as it was amended in Laws of Washington, 1923, Chapter 46, Section 7) was unconstitutional in that it authorized an assessment in excess of benefits. It is to be noted that the issue arose before the construction of the improvement, the issuance of any bonds, or the making of any levy. The Supreme Court of the State of Washington, on page 95 of 236 Pac. and page 553 of 134 Wash., overruled this contention on the authority of *State ex rel. Clancy v. Columbia Irrigation District of Stevens County,* 121 Wash. 79, 208 Pac. 27, saying:

> " * * * There can be no difference between the two cases. Diking districts as well as irrigation districts are public improvemnets. The cost in each is to be assessed against the property benefited. Of course there is a difference in the details as to the procedure. The obligation created by the statute is a general and not a specific lien against all the property therein,"

and concludes with the following language from the same case on page 554 of 134 Wash., and page 95 of 236 Pac.:

> " * * * So long as the benefits to the entire district are greater than the amount of liability imposed, there can be no constitutional objection to the providing that there shall exist the general or secondary liability."

It will be noted that the court did not specifically state that levies for the "primary" plus "secondary" liability might be levied in excess of benefits but the language used when read in connection with the reference to *State ex rel. Clancy v. Columbia Irrigation District of Stevens County, supra,* does give rise to the inference that so long as the total benefits to the district as a whole exceed the amount of the bonded obligation, the lands therein are liable to an unlimited assessment for the payment thereof. Counsel for the plaintiff in the case of *Kadow et al. v. Paul et al., supra,* so understood it, and appealed to the United States Supreme Court, on the theory that thus construed the statute was unconstitutional in that it authorized assessments against the individual landowner in excess of his individual benefits.

The Supreme Court of the United States, recognizing that the diking district statute would be unconstitutional if so construed, affirmed the decision on the ground that the 1923 amendment *did not authorize an assessment against any particular land in excess of individual benefits.* It is stated in the opinion that the amendment of 1923 did not change the fundamental rule of law laid down in *Foster v. Commissioners of Cowlitz County et al.,*

100 Wash. 502, 512; 171 Pac. 539, 542, where it is said:

> "* * * When it comes to charging the cost of the improvement against the several tracts of land within the district, such charge must be 'in proportion to the benefits accruing thereto,' *and we think the statute also means that no tract of land can be charged in excess of the benefits accruing thereto.*" (Italics ours.)

The United States Supreme Court in *Kadow et al. v. Paul et al.,* 274 U. S. 175, 180, said:

> "It seems clear to us that there is nothing in this amendment which changes the rule of construction of the statute, as laid down by the Supreme Court in the *Foster* case, imposing a limitation in favor of the assessment payers against any supplemental assessment that should exceed the benefits conferred on each one by the improvement.",

and later concludes, on page 181:

> "When the operation of the law works uniformly as against all parts of the assessment district and results in a higher cost of improvement, an increased assessment on all the owners of the land who have paid, it violates no constitutional right of theirs *as long as their benefits continue respectively to exceed their individual assessments.*" (Italics ours.)

We most urgently invite a comparison of the language of the Supreme Court of the United States with the language of the Supreme Court of the State of Washington in the same case. The State Supreme

Court seems to say that as long as the total benefits were equal to the total bonded liability there could be no objection to assessing and re-assessing until the obligations were fully paid. The Supreme Court of the United States, as quoted above, said that there can be no constitutional objection

"* * * as long as their benefits continue *respectively to exceed their individual assessments.*" (Italics ours.)

This holding of the Supreme Court of the United States has since been acquiesced in by the Supreme Court of the State of Washington, in construing the diking laws, in the case of *Boyd et al. v. Cunningham et al.,* 164 Wash. 335; 2 Pac. (2d) 647.

We also invite a comparison of the language of *Foster v. Commissioners of Cowlitz County et al.,* 100 Wash. 502; 171 Pac. 539, and *Boyd et al. v. Cunningham et al., supra,* with the language used in *State ex rel. Clancy v. Columbia Irrigation District of Stevens County,* 121 Wash. 79; 208 Pac. 27, and *State ex rel. Wells v. Hartung et al.,* 150 Wash. 590; 274 Pac. 181.

In its attempted application of the rule laid down by the Supreme Court of the United States in *Kadow et al v. Paul et al.,* 274 U. S. 175; 71 L.

Ed. 982; 47 Sup. Ct. 561, the State Supreme Court herein fails to distinguish between the "cost of the improvement" and "maximum benefit." Ordinarily, the aggregate benefits substantially exceed the aggregate costs of improvement. Hence, the individual benefit exceeds the individual cost of the improvement. If each landowner pays his proportionate share of the cost of the improvement the bonds will be paid before any landowner has paid the full amount of his benefit, but each landowner is at all times liable to be required to pay his maximum benefit in the event delinquencies make it necessary for him to do so in order to discharge the bonds. That liability, however, extends no further than the maximum benefit. Hence, when a landowner has paid, on account of his proportion of the cost of the improvement and delinquencies, a sum equal to his maximum benefit, his liability is fully discharged. No further assessments can be levied against him. This is the *true* holding of *Kadow et al. v. Paul et al., supra.* We do not contend that levies cannot be made for delinquencies. *We do contend, however, that levies for delinquencies cannot be made in excess of maximum individual benefits.*

We submit that *Kadow et al. v. Paul et al.,*

supra, as decided by the Supreme Court of the United States, correctly announced and applied the constitutional principles for which we are here contending. Their application did not require reversal of the Washington Supreme Court by the Supreme Court of the United States in that case for the reason that the diking district had not actually been formed. It had levied no assessments and this Court avoided a reversal by indulging the presumption that, when occasion arose to make an actual levy, the District and the courts would do so in conformity with the constitutional principles set forth in *Foster v. Commissioners of Cowlitz County,* 100 Wash. 502; 171 Pac. 539. This assumption was ultimately realized by the decision in *Boyd et al. v. Cunningham et al.,* 164 Wash. 335; 2 Pac. (2d) 647.

The application of the principle of *Kadow et al. v. Paul et al., supra,* requires a reversal of the present case for the reason that the district has been formed, bonds issued, levies actually made against this Appellant in an amount admittedly in excess of his maximum benefit, and a further levy, in a substantial sum, is admittedly threatened for the purpose of recuperating the delinquencies of other landowners. The district has declared its policy

and intention to continue said levies to whatever extent may be necessary to meet the entire bonded indebtedness (R. 4, 5, 6.), and the Supreme Court of the State of Washington has sustained such levy by reference to Remington's Revised Statutes, Section 7434 (Appendix v.),

> *Roberts v. Richland Irrigation District et al.,* 69 Wash. Dec. 108, 112; 13 Pac. (2d) 437, 439 (R. 26.),

and in reaffirming the declaration in *State ex rel. Wells v. Hartung et al.,* 150 Wash. 590, 600; 274 Pac. 181, 185, to-wit:

> "It must be conclusively presumed from the due adjudication of the organization of the district in 1918 determining the lands to be therein included, the amount of bonds to be issued, and the interest to be paid thereon, that the total benefits to the lands comprised in the district were then finally adjudicated. Each tract of land within the district then became generally liable for the payment of bonds and interest."

The State Supreme Court herein has thus expressly negatived the possibility of the application of the principle of *Foster v. Commissioners of Cowlitz County,* 100 Wash. 502; 171 Pac. 539.

D. Effect of the Holding of the State Supreme Court in the Case on Appeal.

In its final analysis, the State Supreme Court, in its opinion herein, holds that the only legal requisite of a valid special assessment is that it shall be apportioned in accordance with benefits. It is our contention that aggregate individual assessments must not only be apportioned in accordance with maximum individual benefits, *but must be limited to maximum individual benefits.*

There are two requirements for a legal special assessment: (a) uniformity as to all parts of the assessment district; and (b) limitation of the total assessments against a specific tract to the amount of the total benefits conferred thereon.

> "When the operation of the law works uniformly as against all parts of the assessment district, and results in a higher cost of the improvement, and an increased assessment on all the owners of land who have paid, it violates no constitutional right of theirs *as long as their benefits continue respectively to exceed their individual assessments.*" (Italics ours.)
>
> *Kadow et al. v. Paul et al.*, 274 U. S. 175, 181; 71 L. Ed. 982; 47 Sup. Ct. 561.

See also:

> *Foster v. Commissioners of Cowlitz County*, 100 Wash. 502; 171 Pac. 539.

Boyd et al. v. Cunningham et al., 164 Wash. 335; 2 Pac. (2d) 647.

Perkins & Co. v. Diking District No. 3 of Island County, 162 Wash. 227; 298 Pac. 462.

See also the following quotation from *1 Page and Jones on Taxation by Assessment,* p. 197, Sec. 118, 1909 Ed.:

> "If the assessment is not apportioned in substantially the same ratio as the benefits *or if it is substantially in excess thereof, such assessment is invalid as amounting to a taking of property without due process of law.*" (Italics ours.)

Inaccurate use of legal terminology contributes to the confusion of thought found in the decisions of the Supreme Court of the State of Washington. They speak of the primary and secondary liability, terms appropriate in discussing the law of contract but inapplicable to the law of taxation. There is no *primary* and *secondary* liability for a special assessment tax. The individual landowner is liable for the full amount of his maximum benefit. There is but one liability for the maximum benefit. It may be contingent to the extent of the difference between his proportion of the cost of the improvement and the maximum benefit to his land, but it exists by

reason of the benefits which accrue to his land. It continues until he has paid the full amount of that benefit accruing to his land, unless the bonded indebtedness has been discharged before that time. It ceases when that maximum benefit has been paid, whether the bonds have been discharged or not.

CONCLUSION.

In conclusion, we submit that this case is not one of passing or individual importance. Upon it depend the constitutional rights of thousands of tax-burdened farmers. No decision of this Court of comparable importance to the irrigated areas of the West has been handed down since the case of *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112; 17 Sup. Ct. 56; 41 L. Ed. 369, to which the pronouncement in this case must necessarily be a complement. We have, therefore, felt justified in indicating to this Court the holdings of the courts of last resort, in irrigation states, wherein the constitutional principles set forth in *Fallbrook Irrigation District v. Bradley, supra,* have been given practical application during the intervening period of thirty-seven years.

We respectfully submit that we have demonstrated:

(1) That there is a difference, universally recognized by authorities, between the power to tax for general governmental purposes and the power to levy assessments for local improvements, and that the difference affects the circumstances under which and the extent to which each may be levied;

(2) That the levy made by the directors of an irrigation district is a special assessment for a local improvement and is governed by the rules of law relating thereto;

(3) That an assessment against a particular piece of land for local improvements, in substantial excess of the benefits accruing to that particular land by reason of the improvements, constitutes a taking of property without due process of law;

(4) That the Washington Irrigation District statute, as construed and applied by the Supreme Court of that State, in the instant case, authorizes a levy of special assessments against a tract of land for local improvements in substantial excess of the benefits accruing to such land by reason of the improvements; and, as so construed and applied, contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, we respectfully submit that the judgment of the State Supreme Court, herein, should be reversed.

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APPENDIX.

I.

THE IRRIGATION DISTRICT LAW OF THE STATE OF WASHINGTON.

The Irrigation District Law of the State of Washington is embodied in Remington's Revised Statutes of Washington, Volume 8, Title 48, Chapter 5, Sections 7417 to 7505-5 inclusive, pages 498 to 586 inclusive, pertinent provisions of which are summarized as follows* (Sections 7417-7505, inclusive, pages 1710 to 1761, inclusive, Remington's Compiled Statutes of Washington, 1922, Volume II, Title XLVIII, Chapter IV, as amended by Sections 7417 to 7505-5, inclusive, pages 973 to 999, inclusive, Remington's Compiled Statutes of Washington, 1927 Supplement, Title XLVIII, Chapter IV, and as amended by Chapter 181 of the Session

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*At the time Appellant's Statement as to Jurisdiction was prepared, Remington's Revised Statutes of Washington, which incorporates all the statutes of the State of Washington in one publication, was not published. Appellant in his Statement as to Jurisdiction referred to the earlier publications of the Statutes of the State of Washington and Session Laws of the State of Washington, and so, for the convenience of the Court, the references to these earlier publications and Session Laws will be inserted in parentheses at the end of each paragraph wherein the analogous references are made to Remington's Revised Statutes of Washington.

Laws of the State of Washington for 1929, Sections 1 to 3, inclusive, pages 469 to 474, inclusive, and by Chapter 185 of the Session Laws of the State of Washington for 1929, Sections 1 to 4, inclusive, pages 478 to 487, inclusive.)

Section 7417 of Remington's Revised Statutes of Washington, Vol. 8, page 498, provides that whenever a majority of the holders of title to lands susceptible of "irrigation" desire to provide construction of works for the irrigation of the same, they may propose the organization of an irrigation district, and when so organized such district shall have the powers conferred by law. (Section 7417 of Remington's Compiled Statutes of Washington, 1922, page 1710, as amended by Section 7417, page 973, of Remington's Compiled Statutes of Washington, 1927 Supplement.)

Sections 7417-1 and 7417-2 of Remington's Revised Statutes of Washington, Vol. 8, pages 499 and 500, set forth the purposes and powers of such an irrigation district, to-wit:

> (a) The construction or purchase of works, or parts of same, for the irrigation of lands within the operation of the district.
>
> (b) The construction, repair or improvement of existing irrigation works.

(c) The operation or maintenance of existing irrigation works.

(d) The construction, reconstruction, repair or maintenance of a system of diverting conduits from a natural source of water supply to the point of individual distribution for irrigation purposes.

(e) The execution and performance of any contract authorized by law with any department of the Federal Government or of the State of Washington, for reclamation and irrigation purposes.

(f) The performance of all things necessary to enable the district to exercise the powers herein granted.

(g) To purchase, and sell electric power to the inhabitants of the irrigation district for the purposes of irrigation and domestic use.

(h) To construct, repair, purchase, maintain or lease a system for the sale or lease of water to the owners of irrigated lands within the district for domestic purposes.

(i) To construct, repair, operate and maintain a system of drains, as herein provided.

(j) To assume, as principal or guarantor, any indebtedness to the United States under the Federal reclamation laws, on account of district lands.

(Sections 7417-1 and 7417-2, pages 973 and 974, Remington's Compiled Statutes of Washington, 1927 Supplement.)

Sections 7418 to 7427, inclusive, of Remington's Revised Statutes of Washintgon, Vol. 8, pages 500 to 512, inclusive, prescribe the steps to be taken to form an irrigation district, including the election of a Board of Directors. (Sections 7418 and 7419, pages 1710 to 1714, inclusive, of Remington's Compiled Statutes of Washington, 1922, as amended by Sections 7418 and 7419, pages 974 to 977, inclusive, of Remington's Compiled Statutes of Washington, 1927 Supplement, and Sections 7420 to 7427, inclusive, pages 1714 to 1719, inclusive, Remington's Compiled Statutes of Washington, 1922.)

Sections 7428 to 7431½-6, inclusive, of Remington's Revised Statutes of Washington, Vol. 8, pages 512 to 522, inclusive, describe and set forth the powers and duties of said Board of Directors. (Section 7428, page 1719, Section 7429, page 1720, Section 7430, page 1722, and Section 7431, page 1723, of Remington's Compiled Statutes of Washington, 1922, and Sections 7428-1, 7428-2, 7428-3, page 978, and Section 7429-1, page 979, and Sections 7431½, 7431½-1, 7431½-2, 7431½-3, 7431½-4, 7431½-5, 7431½-6, pages 979 and 980, of Remington's Compiled Statutes of Washington, 1927 Supplement.)

Sections 7432 to 7435, inclusive, of Remington's

Revised Statutes of Washington, Vol. 8, pages 522 to 534, inclusive, authorize the districts to issue and sell bonds for the purposes therein mentioned, and to prescribe the necessary steps therefor, the necessary investigation prior to the sale of said bonds, and the conditions and terms of said bonds. (Section 7433, page 1726, Section 7434, page 1726, and Section 7435, page 1727, of Remington's Compiled Statutes of Washington, 1922, and Section 7432, page 1723, of Remington's Compiled Statutes of Washington, 1922, as amended by Section 7432, page 981, of Remington's Compiled Statutes of Washington, 1927 Supplement, and Sections 7432-1 to 7432-14, inclusive, pages 984 to 987, inclusive, and Sections 7434-1 to 7434-7, inclusive, pages 988 and 989, of Remington's Compiled Statutes of Washington, 1927 Supplement.)

Section 7434 of Remington's Revised Statutes of Washington, Vol. 8, page 531, provides:

> "Said bonds and interest thereon * * * shall be paid by revenue derived from an annual assessment upon the real property of the district, *and all the real property in the district shall be and remain liable to be assessed for such payments until fully paid as hereinafter provided.*" (Italics ours.)

This section also provides for a lien upon the

property of a district in favor of said bonds and gives a right of foreclosure thereof.

Section 7436 of Remington's Revised Statutes of Washington, Vol. 8, page 535, provides as follows:

> "*Assessments made in order to carry out the purpose of this act shall be made in proportion to the benefits accruing to the lands assessed* and equitable credit shall be given to the lands having a partial or full water right. * * * The secretary must, between the first Monday in March and the first Tuesday in September in each year * * * prepare an assessment roll with appropriate headings in which must be listed all the lands within the district. In such book must be specified, in separate columns, under the appropriate headings:
>
> "First, the name of the person to whom the property is assessed. * * *
>
> "Second, land by township, * * * giving an estimate of the number of acres. * * *
>
> "Third, in further columns with appropriate headings shall be specified the ratio of benefits, or, when deemed by the secretary more practicable, the per acre value, or the amount of benefits, for general and special district purposes, and the total amount assessed against each tract of land." (Italics ours.)
>
> (Section 7436, pages 1727 and 1728, Remington's Compiled Statutes of Washington, 1922.)

Section 7438 of Remington's Revised Statutes of Washington, Vol. 8, page 536, provides that before the first Tuesday in November in each year the secretary must complete his assessment-roll and deliver it to the board, which shall give notice thereof, and of the time the board, acting as a board of equalization, will meet to equalize assessments.

(Section 7438, pages 1728 and 1729, Remington's Compiled Statutes of Washington, 1922.)

Section 7439 of Remington's Revised Statutes of Washington, Vol. 8, page 537, requires the board

> "* * * to hear and determine such objections to the said assessment-roll as may come before them; and the board may change the same as may be just."

(Section 7439, page 1729, Remington's Compiled Statutes of Washington, 1922.)

Section 7440 of Remington's Revised Statutes of Washington, Vol. 8, pages 537 to 539, inclusive, provides that:

> "The board of directors shall in each year * * * levy an assessment sufficient to raise the ensuing annual interest on the outstanding bonds, * * *

and

> "Beginning in the year preceding the maturity of the first series of the bonds of any

issue, the board must from year to year increase said assessment for the ensuing years in an amount sufficient to pay and discharge the outstanding bonds as they mature. * * * *The board shall also at the time of making the annual levy, estimate the amount of all probable delinquencies on said levy and shall thereupon levy a sufficient amount to cover the same and a further amount sufficient to cover any deficit that may have resulted from delinquent assessmnets for any preceding year.* * *

"If the annual assessment roll of any district has not been delivered to the county treasurer * * * or if said roll when delivered is not equalized and the required assessments levied as required by law, or if for any reason the required assessment or levy has not been made, the county treasurer shall immediately notify the board of county commissioners of the county in which the office of the board of directors is situated, and said board of county commissioners shall cause an assessment roll for the said district to be prepared and shall equalize the same if necessary and make the levy required by this chapter in the same manner and with like effect as if the same had been equalized and made by the said board of directors, and all expenses incident thereto shall be borne by the district. * * *

"At the time of making the annual levy in the year preceding the final maturity of any issue of district bonds, the board of directors shall levy a sufficient amount to pay and redeem all bonds of said issue then remaining unpaid. * * *" (Italics ours.)

(Chapter 185, Section 1, pages 478 to 482, in-

clusive, of the Session Laws of 1929 of the State of Washington, which amends Section 7440, page 990, of Remington's Compiled Statutes of Washington, 1927 Supplement, which amends Section 7440, page 1729, Remington's Compiled Statutes of Washington, 1922.)

Section 7441 of Remington's Revised Statutes of Washington, Vol. 8, page 540, provides that the assessment upon real property shall be a lien against the property assessed. (Section 7441, pages 1730 and 1731, Remington's Compiled Statutes of Washington, 1922.)

Sections 7442 to 7442-2, inclusive, of Remington's Revised Statutes of Washington, Vol. 8, pages 541 to 544, inclusive, provide for the collection of the assessment. (Section 7442, pages 1731 and 1732, Remington's Compiled Statutes of Washington, 1922, as amended by Chapter 181 of the Session Laws of 1929 of the State of Washington, Section 1, pages 469 to 472, inclusive, and Sections 7442-1 and 7442-2, pages 992 and 993, Remington's Compiled Statutes of Washington, 1927 Supplement.)

Sections 7443 to 7445, inclusive, Remington's Revised Statutes of Washington, Vol. 8, pages 544

to 547, inclusive, provide for the sale of property for delinquent assessments, including a provision that if there is no purchaser in good faith when the property is offered for sale a second time, the whole amount of the property assessed shall be struck off to the irrigation district as the purchaser, and the district is thereupon endowed with the same rights in said property as a private purchaser, and may, if said property is not redeemed, sell it at its *reasonable market value.* (Sections 7443 to 7445, inclusive, pages 1732 to 1735, inclusive, Remington's Compiled Statutes of Washington, 1922, as amended by Chapter 181 of the Session Laws of 1929 of the State of Washington, Sections 2 and 3, pages 472 to 474, inclusive.)

The remaining sections of the Statute, not heretofore referred to, deal with administrative and operative problems not involved in this appeal.

II.

PERTINENT PROVISIONS OF THE CONSTITUTION OF THE STATE OF WASHINGTON.

A.

Section 9 of Article VII of the Constitution of the State of Washington, set forth in Reming-

ton's Revised Statutes of Washington, Vol. 1, page 448:

> "The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same."

*(Section 9 of Article VII of the Constitution of the State of Washington is also set forth in Remington's Compiled Statutes of Washigton, 1922, Vol. 1, page 89.)

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*At the time Appellant's Statement as to Jurisdiction was prepared, Remington's Revised Statutes of Washington, which incorporates all the statutes of the State of Washington in one publication, was not published. Appellant in his Statement as to Jurisdiction referred to the earlier publications of the Statutes of the State of Washington and Session Laws of the State of Washington, and so, for the convenience of the Court, the references to these earlier publications and Session Laws will be inserted in parentheses at the end of each paragraph wherein the analogous references are made to Remington's Revised Statutes of Washington.

B.

Section 6 of Article VIII of the Constitution of the State of Washington, set forth in Remington's Revised Statutes of Washington, Vol. 1, page 454:

> "No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of three-fifths of the voters therein voting at an election to be held for that purpose, nor in cases requiring such assent shall the total indebtedness at any time exceed five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county purposes previous to the incurring of such indebtedness, except that in incorporated cities the assessment shall be taken from the last assessment for city purposes: Provided, that no part of the indebtedness allowed in this section shall be incurred for any purpose other than strictly county, city, town, school district, or other municipal purposes: Provided, further, that any city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding five per centum additional for supplying such city or town with water, artificial light, and sewers, when the works for supplying such water, light, and sewers shall be owned and controlled by the municipality."

(Section 6 of Article VIII of the Constitution of the State of Washington is also set forth in

Remington's Compiled Statutes of Washington, 1922, Vol. 1, page 92.)

C.

Amendment 14 to the Constitution of the State of Washington, set forth in Remington's Revised Statutes of Washington, Vol. 1, pages 526 and 527:

"Article VII is amended by striking out all of sections 1, 2, 3 and 4, and inserting in lieu thereof the following, to be known as Section 1:

"ART. VII, Sec. 1. The power of taxation shall never be suspended, surrendered or contracted away. All taxes shall be uniform upon the same class of property, within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only. The word 'property' as used herein, shall mean and include everything, whether tangible or intangible, subject to ownership. All real estate shall constitute one class: Provided: That the legislature may tax mines and mineral resources and lands devoted to reforestation by either a yield tax or an *ad valorem* tax at such rate as it may fix, or by both. Such property as the legislature may by general laws provide shall be exempt from taxation. Property of the United States and of the state, counties, school districts and other municipal corporations, and credits secured by property actually taxed in this state, not exceeding in value the value of such property, shall be exempt from taxation. The legislature shall have power, by appropriate legislation, to exempt personal property to the amount

of Three Hundred ($300.00) Dollars for each head of a family liable to assessment and taxation under the provisions of the laws of this state of which the individual is the actual *bona fide* owner."

(Laws of Washington, 1929, Chapter 191, Section 1, page 499.)

This Amendment strikes out Sections 1, 2, 3 and 4 of Article VII of the Constitution of the State of Washington, but at the same time reenacts the material portions thereof relevant herein. Sections 1, 2, 3 and 4 of Article VII of the Constitution of the State of Washington are set forth in Remington's Revised Statute of Washington, Volume 1, pages 441, 442 and 447:

"Sec. 1. All property in the state not exempt under the laws of the United States, or under this constitution shall be taxed in proportion to its value, to be ascertained as provided by law. The legislature shall provide by law for an annual tax sufficient, with other sources of revenue, to defray the estimated ordinary expenses of the state for each fiscal year. And for the purpose of paying the state debt, if there be any, the legislature shall provide for levying a tax annually, sufficient to pay the annual interest and principal of such debt within twenty years from the final passage of the law creating the debt.

"Sec. 2. The legislature shall provide by law a uniform and equal rate of assessment

and taxation on all property in the state, according to its value in money, and shall prescribe such regulation by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property: Provided, that a deduction of debts from credits may be authorized: Provided, further, that the property of the United States, and of the state, counties, school districts, and other municipal corporations, and such other property as the legislature may by general laws provide, shall be exempt from taxation.

"Sec. 3. The legislature shall provide by general law for the assessing and levying of taxes on all corporation property as near as may be by the same methods as are provided for the assessing and levying of taxes on individual property.

"Sec. 4. The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the state shall be a party."

(Sections 1, 2, 3 and 4 of Article VII of the Constitution of the State of Washington are also set forth in Remington's Compiled Statutes of Washington, 1922, Volume 1, pages 87 and 88.)

FILE COPY

SUPREME COURT OF THE [illegible]

OCTOBER TERM, 1932

No. 516

J. T. ROBERTS, *Appellant*,

vs.

RICHLAND IRRIGATION DISTRICT, an Irrigation District; C. J. BARNETT, W. A. STOCKMAN, and W. C. MORRIS, Directors of the Richland Irrigation District, an Irrigation District; and HARRY FORSYTH, Treasurer of Benton County, Washington; E. J. PACHUS, IRA C. HAWLEY, and H. S. HUGHES, County Commissioners of Benton County, Washington, Defendants; J. T. S. LYLE, DIX ROWLAND, CHARLES HEATH, T. H. BOWDEN and H. E. DAVENPORT, Individually and as Trustees, Intervenors, *Appellees*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLANT'S REPLY STATEMENT AS TO JURISDICTION

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Seattle, Wash.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 516

J. T. ROBERTS, *Appellant*,

vs.

RICHLAND IRRIGATION DISTRICT, an Irrigation District; C. J. BARNETT, W. A. STOCKMAN, and W. C. McINNIS, Directors of the Richland Irrigation District, an Irrigation District; and HARRY FORSYTH, Treasurer of Benton County, Washington; B. J. PACIUS, IRA C. HAWLEY, and H. S. HUGHES, County Commissioners of Benton County, Washington, Defendants; J. T. S. LYLE, DIX ROWLAND, CHARLES HEATH, T. H. BOWDEN and H. E. DAVENPORT, individually and as Trustees, Intervenors, *Appellees.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLANT'S REPLY STATEMENT AS TO JURISDICTION

INDEX

SUBJECT INDEX

Page

I. The State Supreme Court Necessarily Passed on the the Federal Question Presented Herein by Appellant.. 1

A. The Federal Question Presented by Appellant is the Only One in This Case..... 1

B. The Admitted Facts in the Complaint Are the Only Facts Before This Court..... 4

II. Statements Contained in Briefs in State Supreme Court Do Not Alter Admitted Facts in the Complaint..... 5

A. Statements Contained in Appellees' Briefs in State Supreme Court 6

B. Statemenst Contained in Appellant's Brief in State Supreme Court 7

III. The Sole Question Presented Herein Is: To What Extent Has the Irrigation District the Right to Levy for the Payment of Delinquencies?..... 9

IV. The Case of State ex rel. Wells v. Hartung et al., Does Not Preclude This Appeal..... 10

A. The Judgment in State ex rel. Wells v. Hartung et al. Is Not Part of the Record Before This Court 11

B. The Judgment in State ex rel. Wells v. Hartung et al. Is Not Res Adjudicata on the Parties Herein 12

C. The Judgment in State ex rel. Wells v. Hartung et al. Is Not Stare Decisis for This Case..... 14

V. Conclusion 15

INDEX

INDEX TO AUTHORITIES

CASES CITED

Page

Bartelt v. Seehorn, 25 Wash. 261; 65 Pac. 185 11

Behrens v. Commercial Waterway District No. 1 of King County et al., 107 Wash. 155; 181 Pac. 892 10

Boyd et al. v. Cunningham et al., 164 Wash. 335, 2 Pac. (2d) 647 ..... 7, 10

Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 27 Colo. 1; 59 Pac. 607; 50 L. R. A. 209 14

Canal Lumber Co. v. Kong Yick Investment Co. et al., 72 Wash. 437; 130 Pac. 492 11

First National Bank of Guthrie Centre v. Anderson, County Auditor, et al., 269 U. S. 341 4

Foster v. Commissioners of Cowlitz County, 100 Wash. 502; 171 Pac. 539 ..... 6, 10

Harding v. Illinois, 196 U. S. 78 4

In re Assessment for Local Improvement Sewer District No. 1, 84 Wash. 565; 147 Pac. 199 13

Kadow et al. v. Paul et al., 274 U. S. 175; 71 L. Ed. 982; 47 Sup. Ct. 561 ..... 6, 9

Lownsdale et al. v. Grays Harbor Boom Co., 54 Wash. 542; 102 Pac. 833 11

Merrick v. Neely, 143 Wash. 588; 255 Pac. 956 11

Pacific Iron & Steel Works v. Goerig, 55 Wash. 149; 104 Pac. 151 11

Perkins & Co. v. Diking District No. 3 of Island County, 162 Wash. 227; 298 Pac. 462 ..... 7, 10

Poolman et al. v. Langdon et al., 94 Wash. 448; 162 Pac. 578 10

Posados v. Warner Barnes & Co. Ltd., 297 U. S. 340; 73 L. Ed. 729 14

Roberts v. Richland Irrigation District, et al., 69 Wash. Dec. 108; 13 Pac. (2d) 437 (R. 22.) 2

INDEX

Page

Rork v. Smith et al., 55 Wis. 67; 12 N. W. 408 13

Russell et al. v. Mutual Lumber Co., 134 Wash. 508; 236 Pac. 96 12

Stallcup v. City of Tacoma, 13 Wash. 141; 42 Pac. 541 11

State ex rel. Forgues v. Superior Court for Lewis County, 70 Wash. 670; 127 Pac. 313 13

State ex rel. Wells v. Hartung et al., 150 Wash. 590; 274 Pac. 181 ..... 10, 11, 12, 13, 14

Truax et al. v. Corrigan et al., 257 U. S. 312 3

Zadig v. Baldwin, 166 U. S. 485 4

TEXTS CITED

1 Page and Jones on Taxation by Assessment, 1909 Ed. 7

23 Cyc. 1269 13

7 R. C. L., p. 1005 14

On December 5, 1932, this Court reserved a final ruling upon the question of jurisdiction until the hearing on the merits. We, therefore, deem it appropriate, by analogy to Rule 7 (3) of the Revised Rules of the Supreme Court of the United States, to present to this Court the following matter by way of reply to Appellees' Statement Against Jurisdiction.

I.

The State Supreme Court Necessarily Passed on the Federal Question Presented Herein by Appellant.

On page two of Appellees' Statement Against Jurisdiction, it is admitted that the State Supreme Court did in fact pass upon the Federal Constitutional question presented by the Appellant herein, but it is said it was not necessary for it to do so.

A. THE FEDERAL QUESTION PRESENTED BY APPELLANT IS THE ONLY ONE IN THIS CASE.

There was no other question in the case. The complaint was carefully framed to present said Federal question. The State Supreme Court recognized this fact and passed upon that Federal question as the only one presented:

> "Is the annual assessment against each tract of land within an irrigation district for the payment of interest or the principal of bonds, issued to pay the cost of irrigation district improvements, limited to the maximum benefits accru-

ing to the tract of land by reason of such improvements? That is the only question, which is not an open one in this state, presented by this appeal."

Roberts v. Richland Irrigation District, et al., 69 Wash. Dec. 108, 111; 13 Pac. (2d) 437, 438 (R. 24.),

and

"* * * It is insisted that the statute, if it authorize the annual levy of assessments for bond purposes in excess of benefits received from such bond issue, is unconstitutional in that the taking of property without due process of law is thereby made possible. * * *"

Roberts v. Richland Irrigation District, et al., supra, page 111 in Wash. Dec., and page 438 in 13 Pac. (2d) (R. 25.)

and also

"Our Irrigation Statute in no wise offends against the State Constitution *or the United States Constitution.* We have considered all of the authorities cited and deem it unnecessary to review them, as *State ex rel. Wells v. Hartung*, 150 Wash. 590, 274 Pac. 181, is determinative of the case at bar." (Italics ours.)

Roberts v. Richland Irrigation District, et al., supra, page 115 in Wash. Dec., and page 440 in 13 Pac. (2d) (R. 29.)

Even though the State Supreme Court used other language to the contrary, this question, having been raised by complaint (R. 1.) and demurrers thereto (R. 15, 16, 17.), this Court will determine for itself from the admitted allegations of the complaint

whether the Federal constitutional question, presented by Appellant, was necessarily passed upon by the State Supreme Court, and will not be concluded by the view taken of them by the State Supreme Court.

In *Truax, et al., v. Corrigan, et al.*, 257 U. S. 312, 324, this Court said:

> "The facts alleged are admitted by the demurrer and in determining their legal effect as a deprivation of plaintiffs' legal rights under the Fourteenth Amendment, we are at as full liberty to consider them as was the State Supreme Court. *Mackay v. Dillon*, 4 How. 421; *Dower v. Richards*, 151 U. S. 658, 667. Nor does the court's declaration that the statute is a rule of evidence bind us in such an investigation. *Bailey v. Alabama*, 219 U. S. 219, 238, 239; *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418; *Mugler v. Kansas*, 123 U. S. 623, 661; *Corn Products Refining Co. v. Eddy*, 249 U. S. 427, 432. In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. *Kansas City Southern Ry. Co. v. Alberts Commission Co.*, 223 U. S. 573, 591, 593; *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 223 U. S. 655, 668, 669; *Southern Pacific Co. v. Schuyler*, 227 U. S. 601, 611. * * *

> In view of these decisions and the grounds upon which they proceed, it is clear that in a case like the present, where the issue is whether a state statute in its application to facts which are set out in detail in the pleadings and are admitted by demurrer, violates the Federal Constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the State Supreme Court in this regard."

See also

First National Bank of Guthrie Centre v. Anderson, County Auditor, et al., 269 U. S. 341, 346.

B. THE ADMITTED FACTS IN THE COMPLAINT ARE THE ONLY FACTS BEFORE THIS COURT.

Counsel concede that the Federal constitutional question is raised by the allegations of the complaint, but assert that those allegations are not true in fact, and seek to substitute for them inferences of fact drawn from certain statements appearing in Appellees' briefs in the State Supreme Court.

Briefs filed in the State Supreme Court, even though they be certified to the Supreme Court of the United States by the Clerk of the State Supreme Court, as a part of the record in the State Court, do not properly form a part of the record in the Supreme Court of the United States.

Harding v. Illinois, 196 U. S. 78, 84.

Zadig v. Baldwin, 166 U. S. 485, 488.

The Appellant was denied an opportunity to prove the allegations of his complaint in the Trial Court by the admissions of the Appellees that those allegations were true and the holding of the Trial Court that they did not state a cause of action. Now, in the court of last resort, counsel concede that the allegations of the complaint do state a cause of action, but seek to avoid reversal by withdrawing the admissions of their demurrers, and substituting therefor an entirely different state of facts, which appears nowhere in the record. Acceptance of such an argument by the Court would mean the Appellant is precluded from proving the facts in the Trial Court, and from a consideration of the question of law in the Appellate Court.

II.

Statements Contained in Briefs in State Supreme Court Do Not Alter Admitted Facts in the Complaint.

We note that the so-called admissions, set forth on pages 4, 5 and 6 of Intervenor Appellees' Statement Against Jurisdiction, are with one exception drawn from their own brief in the State Supreme Court, or that of the Defendant Appellees. We are at a loss to understand how they can be construed as admissions against this Appellant.

A. STATEMENTS CONTAINED IN APPELLEES' BRIEFS IN STATE SUPREME COURT.

It is true that Appellant does not contend that the levy in question was not made in proportion to benefits. Appellant, however, asserts that the amount apportioned substantially exceeds the benefit to his land, and is, therefore, invalid. Appellant does not question the right of the Board to levy special assessments so apportioned, so long as the aggregate of the successive assessments do not substantially exceed the total amount of the maximum benefit to his land.

There are two requirements for a legal special assessment: (a) uniformity as to all parts of the assessment district; and (b) limitation of the total assessments against a specific tract to the amount of the total benefits conferred thereon.

> "When the operation of the law works uniformly as against all parts of the assessment district, and results in a higher cost of the improvement, and an increased assessment on all the owners of land who have paid, it violates no constitutional right of theirs *as long as their benefits continue respectively to exceed their individual assessments.*" (Italics ours.)
>
> *Kadow et al. v. Paul et al.*, 274 U. S. 175, 181; 71 L. Ed. 982; 47 Sup. Ct. 561.

See also:

> *Foster v. Commissioners of Cowlitz County*, 100 Wash. 502; 171 Pac. 539.

Boyd et al. v. Cunningham et al., 164 Wash. 335; 2 Pac. (2d) 647.

Perkins & Co. v. Diking District No. 3 of Island County, 162 Wash. 227; 298 Pac. 462.

See, also, *1 Page and Jones on Taxation by Assessment*, p. 197, Sec. 118, 1909 Ed.:

> "If the assessment is not apportioned in substantially the same ratio as the benefits, *or if it is substantially in excess thereof, such assessment is invalid as amounting to a taking of property without due process of law.*" (Italics ours.)

B. STATEMENTS CONTAINED IN APPELLANT'S BRIEF IN STATE SUPREME COURT.

Based upon the inferences drawn from Appellant's brief in the State Supreme Court, counsel argue that all assessments heretofore levied have been for interest only. This argument is fallacious:

1. The complaint alleges and the demurrers admit that special assessments have been levied against Appellant's land for both principal and interest. (R. 5, 6.)
2. The complaint alleges and the demurrers admit that no benefits of any description have accrued to Appellant's land in excess of a certain specified sum. (R. 4.)
3. The complaint alleges and the demurrers admit that Appellant has paid such benefits with interest. (R. 6.)
4. The complaint alleges and the demurrers admit that the threatened levies by the Irrigation District are not made on account of, or with reference to, any special benefits accruing to Appellant's land. (R. 6.)

We submit that these affirmative allegations, admitted by Appellees' demurrers, may not be deleted or ignored by reference to any statements in the briefs in the State Supreme Court of either Appellant or Appellees.

Arguing from these inferences, the Intervenor Appellees state (Statement Against Jurisdiction, 9) that the extension of time for the payment of principal certainly confers special benefits equal to special assessments so far levied. It is admitted that Appellant has paid his maximum benefit, with interest thereon at the bond rate. (R. 6.) The element of benefit represented by an extension of time accrued to him only to the extent that he enjoyed that extension of time for payment of *his* full liability, including interest. An extension of time to other landowners in the district, for either principal or interest, after he had paid his maximum, was not a benefit to him, but to them only.

Follow this argument to its logical conclusion. Assume that Appellant's land is "the last faithful acre" in the district; that all other landowners have ceased to pay; and that acquired lands are unsalable. Has the district then the power to annually levy the full amount of each year's interest ($32,800.00) against the lands of Appellant, and can he escape this liability only by paying such accrued interest, plus

the principal of the bonds, or would such levy constitute a taking of property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution? We assert that it does. It thus appears that this argument instead of negativing the jurisdiction of this Court, invokes it.

III.

The Sole Question Presented Herein Is: To What Extent Has the Irrigation District the Right to Levy for the Payment of Delinquencies?

On page 9 of Appellees' Statement Against Jurisdiction, it is said:

> "The district has a right to assess the deficit, caused by some of the properties not paying their assessments, upon remaining properties."

To what extent has the district the right to levy for the payment of delinquencies? That is the sole question to be determined herein. Appellant concedes that delinquencies may be levied until exactions in an amount equal to the maximum benefit to his land have been paid by him. He contends that thereafter delinquencies may not be levied against his land, and that to do so constitutes a taking of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

We contend that *Kadow et al. v. Paul et al.*, 274 U. S. 175; 71 L. Ed. 982; 47 Sup. Ct. 561, so holds;

that the Supreme Court of Washington has construed it to so hold in the case of *Boyd et al. v. Cunningham et al.*, 164 Wash. 335; 2 Pac. (2d) 647, and has so held in the following cases:

Poolman et al. v. Langdon et al., 94 Wash. 448; 162 Pac. 578.

Foster v. Commissioners of Cowlitz County, et al., 100 Wash. 502; 171 Pac. 539.

Behrens v. Commercial Waterway District No. 1 of King County, 107 Wash. 155; 181 Pac. 892.

Perkins & Co. v. Diking District No. 3 of Island County, et al., 162 Wash. 227; 298 Pac. 462.

IV.

The Case of State Ex Rel. Wells v. Hartung Et Al. Does Not Preclude This Appeal.

On page 9 of Appellees' Statement Against Jurisdiction it is said that the opinion in the case of *State ex rel. Wells v. Hartung et al.*, 150 Wash. 590; 274 Pac. 181, shows that the question raised by the Appellant herein was raised in said case by the Irrigation District and intervening landowners who appeared for themselves and all other persons similarly interested.

A. THE JUDGMENT IN STATE EX REL. WELLS V. HARTUNG ET AL. IS NOT PART OF THE RECORD BEFORE THIS COURT.

It is not contended that the Appellant herein was a party in the case of *State ex rel. Wells v. Hartung et al., supra.* Even if he had been, the record in that case would still be no part of the record herein.

Merrick v. Neely, 143 Wash. 588; 255 Pac. 956.

The case of *Merrick v. Neely, supra*, is the latest in a long line of decisions of the Supreme Court of the State of Washington which hold that a trial court will not judicially notice the record in another case though it be between the same parties and in the same court, and that an appellate court notices judicially only those matters that the trial court is obliged to notice.

See the cases of

Bartelt v. Seehorn, 25 Wash. 261; 65 Pac. 185.

Lownsdale et al. v. Grays Harbor Boom Co., 54 Wash. 542; 102 Pac. 833.

Pacific Iron & Steel Works v. Goerig, 55 Wash. 149; 104 Pac. 151.

Canal Lumber Co. v. Kong Yick Investment Co. et al., 72 Wash. 437; 130 Pac. 492.

These cases have overruled the earlier case in the State Supreme Court of *Stallcup v. City of Tacoma*,

13 Wash. 141; 42 Pac. 541, which held to the contrary of the now established rule in the State of Washington that the State Supreme Court will not take judicial notice of the record in another case even though it be between the same parties and in the same court.

The State Supreme Court has also expressly held, when considering a demurrer to the sufficiency of the complaint, that it will not entertain a contention that the appellant is precluded by a prior judgment.

Russell et al. v. Mutual Lumber Co., 134 Wash. 508; 236 Pac. 96.

It is obvious that, if such a judgment is not a part of the record in the State Supreme Court, it cannot be part of the record before this Court.

B. THE JUDGMENT IN STATE EX REL. WELLS V. HARTUNG ET. AL. IS NOT RES ADJUDICATA ON THE PARTIES HEREIN.

Under the laws of the State of Washington, a judgment against a public or municipal corporation such as in *State ex rel. Wells v. Hartung et al.*, 150 Wash. 590; 274 Pac. 181, is not binding upon the individual landowners in respect to rights which they

hold as individuals peculiar to themselves and not shared with the public.

In re Assessment for Local Improvement Sewer District No. 1, 84 Wash. 565, 571; 147 Pac. 199, 203.

State ex rel. Forgues v. Superior Court for Lewis County, 70 Wash. 670; 127 Pac. 313.

See also

23 Cyc. 1269.

Rork v. Smith et al., 55 Wis. 67; 12 N. W. 408.

Furthermore, the opinion in the case of *State ex rel. Wells v. Hartung et al., supra*, indicates that it was decided on the 1st day of February, 1929, and that the question involved was the assessment for the year 1928. It takes only a moment's consideration of the complaint herein to note the fact that the threatened action, of which the Appellant is complaining, was for the assessment coming due in 1931. (R. 6.) It might easily have been true that the Appellant herein was not entitled to relief on the date on which the complaint was filed in the case of *State ex rel. Wells v. Hartung et al., supra*, for the reason that possibly the benefits to his land had not been exhausted on that date. The Appellant herein was not bound to challenge the act of the Board until it threatened his rights. The threatened action of which the Appellant herein is complaining was conceived long

subsequent to the final judgment of the case of *State ex rel. Wells v. Hartung et al., supra.*

It is difficult to understand in view of these considerations, on what theory the defense of *res adjudicata* as urged by the Appellee Intervenors can be sustained.

C. THE JUDGMENT IN STATE EX REL. WELLS V. HARTUNG ET AL. IS NOT STARE DECISIS FOR THIS CASE.

The question herein is the determination of whether or not the special assessment objected to by Appellant is a taking of property without due process of law within the meaning of the Fourteenth Amendment to the Federal Constitution. On that question the Supreme Court of the United States is the court of last resort. It is one of the essential elements in the application of the doctrine of *stare decisis* that the decision referred to be that of a court of last resort.

Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 27 Colo. 1; 59 Pac. 607; 50 L. R. A. 209.

Posados v. Warner Barnes & Co. Ltd., 297 U. S. 340; 73 L. Ed. 729.

7 R. C. L., p. 1005.

V.

Conclusion.

In conclusion, we challenge the statement appearing upon pages 3 and 4 of Appellees' Statement Against Jurisdiction, to the effect that upon trial the facts asserted by Appellees would be established but the facts alleged in the complaint would not be established, hence a determination of the question of law herein would be unavailing. The facts alleged in the complaint are now admitted by demurrers of Appellees. (R. 15, 16, 17.) If necessary, the Appellant will prove them upon trial. The rights of the parties, therefore, depend upon the answer which this Court gives to the legal questions presented by this record.

The sole question presented by this appeal is one of profound and vital interest to thousands of ranchers in the irrigated districts of the West, who are annually being subjected to illegal, unconstitutional exactions because they have heretofore been unable to procure an adequate and authoritative decision upon the constitutional question herein presented. The bondholders are the only ones objecting to the jurisdiction of this Court. They seek to evade a determination of this question upon its merits, because to

do so will end the illegal exactions by which they are now profiting.

WHEREFORE, it is respectfully submitted that this Court has jurisdiction of this appeal.

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FILE COPY

Supreme Court of the United States

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RICHLAND IRRIGATION DISTRICT, an Irrigation District; C. J. BARNETT, W. A. STOCKMAN, and W. C. McINNIS, Directors of the Richland Irrigation District, an Irrigation District, and HARRY FORSYTH, Treasurer of Benton County, Washington; B. J. PACKUS, IRA C. HAWLEY, and H. S. HUGHES, County Commissioners of Benton County, Washington, Defendants; J. T. S. LYLE, DIX ROWLAND, CHARLES HEATH, T. H. BOWDEN and H. E. DAVENPORT, individually and as Trustees, Intervenors, *Appellees*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLANT'S REPLY TO BRIEF OF AMICUS CURIAE

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLANT'S REPLY TO BRIEF OF AMICUS CURIAE

INDEX

Page

SUBJECT INDEX

I. The Distinction Between Municipal Corporations Which Do and Do Not Exercise Governmental Functions 1

II. Nature of a Special Assessment 4

III. Analysis of Cases in Brief Amicus Curiae and Their Application Herein 6

IV. Manner of Determining Benefits Herein 10

V. Nature of an Irrigation District and Public Policy Regarding the Same 13

INDEX TO AUTHORITIES

CASES CITED

Beach v. Leahy, 11 Kansas 31 2

Board of Directors of the Middle Kittitas Irrigation District v. Peterson, 4 Wash. 147; 29 Pac. 995 3

Board of Directors of Modesto Irrigation District v. Tregea, 88 Cal. 334; 26 Pac. 237 13

Fallbrook Irrigation District v. Bradley, 164 U. S. 112; 17 Sup. Ct. 56; 41 L. Ed. 369 13

Kadow et al. v. Paul et al., 134 Wash. 539; 236 Pac. 90 ..... 13, 14

Roberts v. Richland Irrigation District et al., 169 Wash. 156; 13 Pac. (2d) 437 (R. 22) 14

Union Trust Company, as Executor, v. Carnhope Irrigation District et al., 132 Wash. 538; 232 Pac. 341; 234 Pac. 277 (on rehearing) 10, 12

TEXTS CITED

Circular No. 72 of the Department of Agriculture of the Federal Government on the Financial Settlements of Defaulting Irrigation Enterprises prepared by Wells A. Hutchins, Associate Irrigation Economist, Division of Agricultural Engineering, Bureau of Public Roads 14

Comes now the appellant and respectfully submits the following for reply to Brief of Amicus Curiae, Erle J. Barnes as Director of the Department of Conservation and Development of the State of Washington.

The brief of amicus curiae illustrates the process of obfuscation by which the real issue involved has been obscured and avoided in the State Supreme Court. The facts pleaded in the complaint and admitted on demurrers are ignored. The decisions of the State Supreme Court construing this statute in vital particulars are not referred to, although discussed at length in appellant's brief.

I.

The Distinction Between Municipal Corporations Which Do and Do Not Exercise Governmental Functions.

Counsel rest their whole argument on the assertion: "An irrigation district is a quasi municipal corporation, and the rules of law applied to municipal corporations are generally applied to such districts."

The *same* rules of law *do not* apply to *all* "municipal corporations". There are two distinct classes of municipal corporations:

(a) Municipal corporations created as arms of the State for the discharge of governmental functions,

and exercising the concomitant power of general taxation to raise the necessary funds to discharge those functions.

(b) Public corporations, mere instrumentalities of the state, exercising no governmental functions, and without the power to levy a general tax, but created solely for the purpose of erecting a local improvement of a public nature, and exercising only the power to levy special assessments *based upon and limited to benefits* conferred.

The question herein presented cannot be decided without reference to this distinction. Counsel for the appellees and for amicus curiae deliberately avoid a consideration thereof, despite the challenge of the numerous citations establishing it in appellant's opening brief, pages 12 to 24.

The taxing power of a "municipal corporation" is determined by the functions which it discharges.

In *Beach v. Leahy*, 11 Kansas, at page 31, Mr. Justice Brewer said:

> "The mere fact that these organizations are declared in the statute to be bodies corporate, has little weight. We look behind the name to the thing named. Its character, its relations and its functions determine its position, and not the mere title under which it passes."

An irrigation district does *not* "exercise very broad powers, including those relating to indebtedness and taxation", as stated on page 8 of the brief of amicus curiae. It exercises only those powers which are expressly conferred upon it by statute, and its power to tax is rigidly limited by the statute and the decisions of the State Supreme Court.

> *Board of Directors of the Middle Kittitas Irrigation District v. Peterson*, 4 Wash. 147, 152; 29 Pac. 995, 996.

An irrigation district is not a true municipal corporation. It exercises no governmental functions.

An irrigation district is without power to levy a general tax of any kind.

An irrigation district is a public corporation, namely a mere instrumentality of the State created solely for the purpose of erecting local improvements. Its only power of taxation is the limited power to levy an assessment against the individual landowner in proportion to and *limited by* benefits conferred upon the individual's land.

See Brief and Argument of Appellant, pages 17 to 30.

Such an assessment levy must be justified, if at all, as a special assessment for a local improvement.

II.

Nature of a Special Assessment

It was admitted by Mr. Thorgrimson, counsel for appellees, on oral argument before this Court, and is admitted by counsel for amicus curiae in their brief (p. 7.) that the levy here involved is "in the nature of special assessments constitutionally justified by benefits upon the property assessed."

It is pleaded in the complaint (R. 4, 5, 6, 7.), and admitted by demurrers (R. 15, 16, 17.) that the assessment in this case substantially exceeds appellant's maximum benefits. In our opening brief, pages 35 to 56, we demonstrated that an assessment against a particular piece of land for local improvements (including an irrigation system) in substantial excess of the benefits accruing to that particular land by reason of the improvements constitutes the taking of property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution. Neither appellant nor amicus curiae have attempted to answer this argument, nor to justify the assessment involved under the universally accepted decisions cited.

This assessment must be either a general tax or an assessment. It must be legally justified as one or the other. No attempt is made to justify it as a

general tax. It is admitted that it is an assessment. Yet no attempt is made to demonstrate wherein it complies with the fundamental principle that individual assessments may not be levied in excess of maximum individual benefits. It is admitted that this assessment does substantially exceed the maximum benefit, and that it was levied without regard thereto. (R. 4, 5, 6, 7.)

This is the only question in the case. It has been adroitly avoided. We assert that this levy can be justified neither as a general tax nor as a special assessment, and certainly it cannot be justified as a mongrel, having some of the ear marks of each, but the legal and constitutional pedigree of neither.

Appellant does not deny that "the state has full and exclusive authority to determine what form improvement districts shall take and what plan of taxation shall be employed for their costs" (Brief of Amicus Curiae, p. 4), but appellant contends that when the state has exercised that power and has created a public corporation and determined that its sole function shall be the erection, operation and maintenance of an irrigation district system, and that its sole power of taxation shall be that of special assessment, that corporation must thereafter exercise the power of assessment in conformity with funda-

mental principles of constitutional law. It may not levy assessments in substantial excess of, or without regard, to the benefits conferred upon the individual. However broad the discretion of the State in the premises it cannot authorize a corporate improvement district to appropriate private property without due process of law.

III.

Analysis of Cases Cited in Brief Amicus Curiae and Their Application Herein.

Counsel have cited a number of decisions of this court from which they seek to draw the inference that this court will in no circumstances interfere with the exercise of the power of taxation by the state or its instrumentalities. Those decisions do not establish any such rule. Taken as a whole they establish the following propositions:

1. The legislature of a state may *by legislative act* create a local improvement district, determine aggregate and individual benefits, and the courts will conclusively presume that adequate hearings were held antecedent to the enactment, and so will not interfere with or question the result.

2. The Legislature may by general law delegate to a subordinate body the power to create a local improvement district, in which event the constitution

guarantees to the individual landowners a hearing upon each of the following (among others) points:

(a) Whether his land received any benefit, and so may be included;

(b) The maximum benefit to the district as a whole;

(c) The apportionment of aggregate benefits to individual tracts, namely the determination of that portion of the aggregate benefits he is to pay.

3. When the Legislature delegates to a subordinate unit the power to create a public improvement district, it may also by general law prescribe the rule, or measuring stick, whereby aggregate benefits are to be apportioned against individual tracts of land.

4. The rule of apportionment, i. e., the measuring stick, by which aggregate benefits are allocated, established by a general law of the state, will not be disturbed by this court unless it is obviously wrong and unjust.

5. When the subordinate body (an irrigation district) applies the measuring stick prescribed by general law, in good faith, this court will not disturb the results, despite the fact that the result is not mathematically accurate or seemingly works a hardship in an individual case.

6. *But when the subordinate body is required to apply the rule, i. e. the measuring stick, established by the legislature, an assessment based upon any other rule of measurement is void.*

7. *When the subordinate body does apply the rule, i. e. the measuring stick, established by the Legislature, the result established by such application is binding on both parties, and establishes*:

(a) The maximum liability of the individual landowner for assessment; and

(b) The limitation of the power of the district to levy against his lands, from which it follows that if the assessment is levied without reference to the rule prescribed by the Legislature, or if the result of the application is disregarded, the assessment is void.

In this case, it is alleged and admitted that the assessment is levied without regard to the legislative rule, in that it admittedly exceeds the maximum benefit accruing to appellant's land, and

> "* * * That no part of said levy is made on account of or with reference to any special benefit accruing to the real property of the plaintiff hereinabove referred to. That said assessment has been levied for the purpose of creating a fund to take up or eliminate the deficiencies in the bond interest and bond retirement funds of said irrigation district, due wholly or in part to a failure of certain landowners within the district to pay assessments which have hereto-

fore or will hereafter be levied against lands in said district belonging to such other persons.

"* * * and that they propose to make such assessments without reference to the special benefits which have accrued to the real property of this plaintiff * * * but to be governed and determined in making said assessments solely by a consideration of the amount of money required to pay said indebtedness." (R. 6, 7.)

Appellant complains because the district intentionally disregards the results produced by application of said legislative rule, and has levied an assessment in substantial excess of the amount of the benefits accruing to his land under that rule. Appellant does not complain because his lands were included in the district. He admits some benefit. He does not question the fairness of the rule or measuring stick for the apportionment of aggregate benefits. He has admittedly paid the full amount of the benefits accruing to his land upon the application of that rule. His sole contention is that his liability is limited by the amount so determined and paid, and that the assessment objected to herein is invalid because it admittedly exceeds that amount and was levied with a deliberate intention to disregard the amount of his maximum benefit as demonstrated by that rule.

What difference does it make that the rule of apportionment is fair and reasonable when it is admitted that the district arbitrarily and intention-

ally disregarded that rule and levied assessments solely upon a consideration of the amount of delinquencies accrued?

What difference does it make that the rule of apportionment is fair if the result of its application is to be disregarded and levies made in excess of the amounts of benefits accruing to the appellant under it?

IV.

Manner of Determining Benefits Herein.

Nor can this objection be met by the contention that the benefits are allocated annually. A determination of benefits whenever made is a judicial proceeding wherein the amount of benefits is determined upon a judicial consideration of all elements of benefit, and of those elements only.

> *Union Trust Company, as Executor, v. Carnhope Irrigation District, et al.*, 132 Wash. 538; 232 Pac. 341; 234 Pac. 277 (on rehearing).

It is alleged and admitted (R. 6, 7.) that in levying this assessment the Board of Directors considered neither the several elements of a benefit nor the maximum benefit accruing to the appellant, but that "no part of said levy is made on account of or with reference to any special benefit accruing to the real property of the plaintiff hereinabove referred

to," (R. 6.) and that in making future assessments the Board proposes to be "governed and determined in making said assessments solely by a consideration of the amount of money required to pay said indebtedness, principal and interest." (R. 7.)

The Board of Directors admittedly did not act judicially in levying this assessment, nor in considering the elements of benefit, nor in determining the maximum benefit. They arbitrarily levied the assessment upon a consideration of one fact only, to-wit, the requirements of the bond issue, which is *no* element of benefit. It is thus alleged and admitted, so far as the annual hearings are concerned, that the Board has not and does not intend to act judicially in determining either the elements of benefit or the maximum benefit to this appellant's land, but has expressly declared its intention to disregard the maximum benefit however or whenever established.

On page 9 of the brief of amicus curiae it is said:

> "The rule of enhanced value determined immediately after the construction of the improvement, as contended for by the appellant, is impracticable, inaccurate and unfair when applied to an irrigation district."

The fact remains that this rule is considered an unequivocally announced one of the Supreme Court of the State of Washington.

"* * * Volumes have been written upon the question of benefits, and a multiplicity of theories have been advanced by different courts and text writers as to the basis upon which the benefits should be determined, but the sound rule, and the one which it would seem all the authorities are coming to, is that these benefits are to be determined, as we have already indicated, by the increase of the market value of the property affected. * * *"

Union Trust Company, as Executor, v. Carnhope Irrigation District, et al., 132 Wash. 538, 541, 542; 232 Pac. 341, 342.

After an extended consideration of the authorities the Court further said, on page 548 in 132 Wash., and page 344 in 232 Pac.:

"Sanctioned by law and fortified by authority as this rule is, it seems it is the proper one to adopt and one which the respondents should have followed in making the assessment, which should have been in proportion to the benefits accruing to the different properties. * * *

"In determining the enhancement of the market value a great many elements, of course, are to be taken into consideration; the market value of the property before the improvement, the nature of the soil, topography of the property itself, use of the improvement, its proximity and availability, its area, frontage, and all the various elements which go to determining the fair market value of a piece of property."

This opinion was affirmed upon a rehearing en banc, and has never been modified or overruled.

V.

Nature of an Irrigation District and Public Policy Regarding the Same.

It is not true that an irrigation district is in any manner distinguishable in its operation or its legal aspects from a drainage, diking or other form of public corporation. It is created solely for the purpose of increasing the value of real property by putting water upon the land by practically the same instrumentalities by which such districts take it off. This court has specifically so declared in *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 173; 17 Sup. Ct. 56; 41 L. Ed. 369, wherein the court quoted from *Board of Directors of Modesto Irrigation District v. Tregea*, 88 Cal. 334; 26 Pac. 237, as follows:

> " 'The formation of irrigation districts is accomplished by proceedings so closely analogous to those prescribed for the formation of swamp-land reclamation districts that the decisions with respect to the latter are authority as to the former, and we cite as conclusive on this point *People v. Hagar*, 52 California, 181; S. C. 66 California, 60. * * * ' "

The Supreme Court of the State of Washington so declared in *Kadow et al. v. Paul et al.*, 134 Wash. 539, 553; 236 Pac. 90, 95:

> " * * * Diking districts as well as irrigation districts are public improvements. The cost

in each is to be assessed against the property benefited."

It is further to be noted that counsel for amicus curiae cite drainage district cases in support of their contention herein, and the Supreme Court of the State of Washington in the instant case seeks to sustain its opinion by a quotation from *Kadow et al. v. Paul et al.*, supra, which dealt with the diking drainage system.

> *Roberts v. Richland Irrigation District, et al.*, 169 Wash. 156, 163; 13 Pac. (2d) 437, 440. (R. 28.)

On page 15 of their brief, counsel for amicus curiae assert that Congress has approved the Irrigation District Statute as applied herein. This we deny, but such approval would not give validity to a constitutionally void assessment. In passing we note that the principle of unlimited liability has been disapproved by another branch of the Federal Government, the Department of Agriculture, which, in its Circular No. 72 on the Financial Settlements of Defaulting Irrigation Enterprises, prepared by Wells A. Hutchins, Associate Irrigation Economist, Division of Agricultural Engineering, Bureau of Public Roads, on page 12 thereof says:

> "Blanket liability, where put to an extreme test, in cases where most of the land is unde-

veloped or defaults are due to other deep seated causes, defeats its ends; for abundant experience has shown that constantly pyramiding assessments will eventually make it impossible for even the best lands to continue paying. This is exactly the situation on several projects now facing readjustment. In such cases all payments from landowners finally cease, whereas the more prosperous landowners could and would continue paying were they individually liable. Furthermore, a landowner assured of individual liability has some incentive to improve his property and thus add a reflected value to the marginal lands; whereas a serious result of general liability is the mental depression and discouragement which grow upon landowners who find their assessments doubled and trebled by reason of failure of others to pay."

This quotation is pertinent in view of the implication made by counsel that the brief of amicus curiae in some measure represents a public interest.

WHEREFORE, we respectfully submit that the judgment of the State Supreme Court, herein, should be reversed.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 516

J. T. ROBERTS, APPELLANT,

vs.

RICHLAND IRRIGATION DISTRICT, AN IRRIGATION DISTRICT; C. J. BARNETT, W. A. STOCKMAN, AND W. C. McINNIS, DIRECTORS OF THE RICHLAND IRRIGATION DISTRICT, AN IRRIGATION DISTRICT, AND HARRY FORSYTH, TREASURER OF BENTON COUNTY, WASHINGTON; B. J. PACIUS, IRA C. HAWLEY, AND H. S. HUGHES, COUNTY COMMISSIONERS OF BENTON COUNTY, WASHINGTON, DEFENDANTS; J. T. S. LYLE, DIX ROWLAND, CHARLES HEATH, T. H. BOWDEN, AND H. E. DAVENPORT, INDIVIDUALLY AND AS TRUSTEES, INTERVENERS, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AGAINST JURISDICTION.

HAROLD PRESTON,
O. B. THORGRIMSON,
L. T. TURNER,
Attorneys for Appellees.

INDEX.

Table of Cases Cited.

	Page
Adams v. Russell, 229 U. S. 353; 57 L. Ed. 1224; 33 S. Ct. 846...	2
American Railway Express Company v. F. S. Royster Guano Company, 273 U. S. 274; 71 L. Ed. 642; 47 S. Ct. 355.....	7
Citizens Bank v. Board of Liquidation, 98 U. S. 140; 25 L. Ed. 114	2
Cook County v. Calumet, etc., Canal Company, 138 U. S. 635; 34 L. Ed. 1110; 11 S. Ct. 435.....	2
DeSaussure v. Gaillard, 127 U. S. 216; 32 L. Ed. 125; 8 S. Ct. 1053	2
Geo. O. Richardson Machinery Company v. Scott, 276 U. S. 128; 48 S. Ct. 264.....	7
Green v. Frazier, 253 U. S. 233; 64 L. Ed. 878; 40 S. Ct. 499....	7
Kadow v. Paul, 134 Wash. 539.....	7, 9
Quong Ham Wah Co. v. Industrial Accident Commission, 255 U. S. 445; 65 L. Ed. 723; 41 S. Ct. 373.....	7
Roberts v. Richland Irrigation District, 69 Wash. Dec. 108, 111.	6, 9
State ex rel Clancey v. Columbia Irrigation District, 121 Wash. 79	7
State ex rel Wells v. Hartung, 150 Wash. 590.....	7, 9
Supreme Lodge K. P. v. Meyer, 265 U. S. 30; 68 L. Ed. 885; 44 S. Ct. 432	7

Statutes Cited.

Constitution of the United States, 14th Amendment.....	2
Supreme Court of the United States, Rule 12 (3).....	1

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 516

J. T. ROBERTS, APPELLANT,

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RICHLAND IRRIGATION DISTRICT, AN IRRIGATION DISTRICT; C. J. BARNETT, W. A. STOCKMAN, AND W. C. McINNIS, DIRECTORS OF THE RICHLAND IRRIGATION DISTRICT, AN IRRIGATION DISTRICT, AND HARRY FORSYTH, TREASURER OF BENTON COUNTY, WASHINGTON; B. J. PACIUS, IRA C. HAWLEY, AND H. S. HUGHES, COUNTY COMMISSIONERS OF BENTON COUNTY, WASHINGTON, DEFENDANTS; J. T. S. LYLE, DIX ROWLAND, CHARLES HEATH, T. H. BOWDEN, AND H. E. DAVENPORT, INDIVIDUALLY AND AS TRUSTEES, INTERVENERS, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

APPELLEES' STATEMENT AGAINST JURISDICTION.

Pursuant to Rule 12 (3) of the rules of this court, appellees submit this statement disclosing matters making against the jurisdiction of this court.

The decisions of the United States Supreme Court clearly establish the rule that to give the court jurisdiction of an appeal from a State court, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but also that the decision of such question was necessary to the determination of the cause.

Cook County v. *Calumet, etc. Canal Company*, 138 U. S. 635; 34 L. Ed. 1110; 11 S. Ct. 435.

DeSaussure v. *Gaillard*, 127 U. S. 216; 32 L. Ed. 125; 8 S. Ct. 1053.

Citizens Bank v. *Board of Liquidation*, 98 U. S. 140; 25 L. Ed. 114.

Adams v. *Russell*, 229 U. S. 353; 57 L. Ed. 1224; 33 S. Ct. 846.

In deciding this case the State Supreme Court necessarily considered the facts well pleaded in the complaint and the admissions contained in the briefs, viewed in the light of the State statutes involved and the decisions of the State Supreme Court construing the same.

It is true that appellant contended in the State Supreme Court that the State statute as applied was repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution, but appellees contend that in the case submitted to the State Supreme Court it was not in any way necessary for that court to decide the Federal question advanced by appellant.

There is no doubt as to the actual facts in the matter. They are these:

A municipal irrigation district, comprising 10,000 acres in extent, was legally formed, and it, on July 1, 1920, issued $538,000 of irrigation bonds, bearing 6 per cent interest, payable semi-annually, the principal payable in installments running from July 1, 1931, to July 1, 1940. The property in the district received special benefits in at least the full amount of the bonded indebtedness and all assessments that had heretofore been levied or are now attempted to be levied are proportionate. All assessments heretofore levied and paid by appellant were for interest alone, and no part of the $538,000 of principal has been paid.

Appellant cannot claim that the foregoing are not the actual facts, but may contend that as the case was decided in the State courts on demurrer to the complaint that all of the foregoing facts do not appear in the record here. It is our belief, however, that taking the allegations in the complaint, as well as the recital of the facts in the decision of the State Supreme Court in this case, and the admissions, express or implied, in the printed briefs on which the case was submitted to the State court, that we are warranted in claiming that this Court has a right to consider the foregoing facts in determining whether it shall take jurisdiction. It is, of course, known to all that a court in deciding cases does consider, in addition to the strictly record facts, the admissions made in both oral and printed arguments.

To now take jurisdiction and decide a question which will not apply if the case should be sent back

for retrial upon issue joined and evidence introduced which would clearly establish the foregoing facts will be but a waste of time and of no assistance in determining the actual controversy.

A review of the record shows the following:

Irrigation bonds in the total sum of $538,000, bearing 6 per cent interest, were issued July 1, 1920, to pay for the improvements made by the irrigation district. Par. VI, Complaint (R. 4).

The bonds matured in various series, commencing July 1, 1931, and ending July 1, 1940. Par. X, Complaint (R. 5).

Appellant, on his forty-acre tract, alleges that he paid a total of $1,166 in assessments in the years 1920 to 1929, inclusive, stating that said assessments were levied for the purpose of providing funds for the payment of principal and interest of the bonded indebtedness, but not alleging how much of said sum was for principal and how much was for interest. Par. XII, Complaint (R. 6).

In addition to the foregoing, the following matters are contained in the printed briefs and either expressly or impliedly admitted:

No question is raised "as to the fact that the aggregate benefits equalled the bonded debt." Appellant's Brief, p. 94. (R. 136).

> "This district contained approximately 10,000 acres. The bonded indebtedness is $538,000. Under the rule announced in the *Hartung* case it is conclusively presumed that the benefits aggregate at least $538,000. Following the presumption and the law it became the duty of

the directors to apportion the aggregate bonded indebtedness against all the land according to their respective benefits." Respondent Irrigation District's Brief, p. 7. (R. 136).

"Plaintiff alleges in his complaint that the full amount of the money procured from the bond issue was expended in the construction of the improvements. The Complaint does not allege, nor does counsel contend, that the total amount of the benefits do not equal the amount of the bond issue. Appellant does not contend that as between him and other privately owned land his land is disproportionately assessed. Appellant only alleges that his land is assessed more than the total benefits, and by benefits he evidently refers to the benefits arising from the physical improvement itself, and not the added benefit accruing to the district as a whole and to each land owner individually by virtue of the acquisition of lands by the district for unpaid assessments and the unpaid assessments on the other lands themselves, both of which elements form the basis for the secondary liability referred to in the *Hartung* case." Interveners' Brief, p. 30-1 (R. 136).

"If he is correct as to his land, then it necessarily follows that as no claim is made that his land has been assessed disproportionately, that all the land in the district has already been assessed for more than maximum benefits received, and the net result is that no part of the entire principal of $538,000 of such bonds can be collected." Interveners' Brief, p. 31-2 (R. 137).

"All the assessments heretofore paid by appellant have been for interest on the bonds. Our contention in our brief in the *Hartung* case was

that interest is not to be included in the computation of maximum assessments supported by the benefit conferred by the original improvement, but is supported by the added benefit of the extension of time allowed for payment of the original cost. This contention was sustained by the Supreme Court, and the provisions of the irrigation law providing assessments for interest held valid, though without discussing the reasons urged in its support." Interveners' Brief, p. 34 (R. 138).

"If the contention of appellant here is sustained no part of the principal of the bonds in the Richland Irrigation District will ever be paid. All owners will claim that they have paid enough interest to equal their total benefits, and the Court will under the authority of this case if appellant wins, enjoin all further assessments against those lands." Interveners' Brief, p. 36 (R. 138).

"It is true as counsel suggests that we have not contended that our land is disproportionately assessed." Appellant's Reply Brief, p. 41 (R. 138).

"No question is raised as to the legality of the formation of the district or of the inclusion of all lands within the district. Counsel concede that the aggregate benefits to the lands within the district equal the bonded indebtedness of the district and that the lands of the appellant have been benefitted to some extent. It is not contended that, as between appellant's land and other privately owned land, the former is disproportionately assessed." Opinion State Supreme Court in *Roberts* v. *Richland Irrigation District,* 69 Wash. Dec. 108, 111. (R. 44).

If, therefore, the 10,000 acres in the district were on July 1, 1920, benefitted in the total amount of the bonded indebtedness and appellant's property has not been disproportionately assessed, and all assessments paid were for interest alone, it is clear that the conclusion in the complaint that the appellant's property had already been assessed more than the total amount of its benefits is not correct.

The construction given by a State Supreme Court to a State statute is binding upon the United States Supreme Court.

Supreme Lodge K. P. v. *Meyer,* 265 U. S. 30; 68 L. Ed. 885; 44 S. Ct. 432.

Quong Ham Wah Co. v. *Industrial Accident Commission,* 255 U. S. 445; 65 L. Ed. 723; 41 S. Ct. 373.

Green v. *Frazier,* 253 U. S. 233; 64 L. Ed. 878; 40 S. Ct. 499.

American Railway Express Company v. *F. S. Royster Guano Company,* 273 U. S. 274; 71 L. Ed. 642; 47 S. Ct. 355.

Geo. O. Richardson Machinery Company v. *Scott,* 276 U. S. 128; 48 S. Ct. 264.

The following matters have been established by the State Supreme Court:

Irrigation bonds are general obligations of the district.

State ex rel. Clancey v. *Columbia Irrigation District,* 121 Wash. 79.

Kadow v. *Paul,* 134 Wash. 539.

State ex rel. Wells v. *Hartung,* 150 Wash. 590.

"An irrigation district is a public corporation having some of the powers of a municipal corporation. The bond obligation is a general corporate obligation. The land-owner is not entitled to a segregation of his share of the obligation at the time it is created, or at a later time. There is no provision in the irrigation act for a segregation at any time. The obligation is a general one and all lands within the district are subject to taxation for the payment of the entire obligation. *State ex rel. Clancy* v. *Columbia Irrigation District*, 121 Wash. 79, 208 Pac. 27; *State ex rel. Wells* v. *Hartung*, 150 Wash. 590, 274 Pac. 181.

"In 1919 there was a due adjudication of the organization of the district determining the lands to be included within the district, the amount of bonds to be issued and the interest to be paid thereon. It must be conclusively presumed, from that adjudication, as we said in *State ex rel. Wells* v. *Hartung, supra.*

> " 'that the total benefits to the lands comprised in the district were then finally adjudicated. Each tract of land within the district then become generally liable for the payment of the bonds and interest.'

"The bond obligation was established. That liability was adjudicated to be within the limits of total benefits. Under the statute (sec. 7434, Rem. Comp. Stat.), all lands within the district became and will remain subject to specific assessment, in proportion to benefits, until the obligation is paid." Opinion State Supreme Court in *Roberts* v. *Richland Irrigation District*, 69 Wash. Dec. 108, 111 (R. 45).

The district has a right to assess the deficit, caused by some of the properties not paying their assessments, upon the remaining properties.

Kadow v. *Paul*, 134 Wash. 539; S. C. 274 U. S. 175, 47 S. Ct. Rep. 561.

State ex rel. Wells v. *Hartung*, 150 Wash. 590.

Roberts v. *Richland Irrigation District*, 69 Wash. Dec. 108.

It being admitted that at the time of the issue of the bonds the land in the district had received total special benefits in an amount equal to the bonded indebtedness, it necessarily follows that as the bonds were payable over a period of years the total special benefits equalled at least the $538,000 of principal, plus the interest accruable thereon during the life of the bonds.

State ex rel. Wells v. *Hartung*, 150 Wash. 590.

The extension of time for payment of the principal certainly confers special benefits equal to the amount of the special assessments so far levied, which are for interest only, and no part of the special benefit accruing from the expenditure of the principal of the bonds has as yet been levied, thus showing that appellant's conclusion that his special benefits have already been used up is not warranted by the facts.

The questions here raised by appellant and respondent irrigation district were, as is shown by the opinion of the State Supreme Court in *State ex rel. Wells* v. *Hartung*, 150 Wash. 590, raised by the same irrigation district and by intervening land owners therein

who appeared for themselves and all other parties similarly interested, in a case involving some of the same assessments herein claimed to have been paid by appellant.

WHEREFORE it is respectfully submitted that the appeal in the above entitled cause does not come within the jurisdiction of this Court.

HAROLD PRESTON,
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We hereby acknowledge service of the foregoing Statement Against Jurisdiction and the receipt of a true copy thereof, this 1st day of November, 1932.

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ALBERT OLESON,
Attorneys for Appellant.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 516

J. T. ROBERTS, Appellant,

vs.

RICHLAND IRRIGATION DISTRICT, an Irrigation District; C. J. BARNETT, W. A. STOCKMAN, and W. C. McINNIS, Directors of the Richland Irrigation District, an Irrigation District, and HARRY FORSYTH, Treasurer of Benton County, Washington; B. J. PACIUS, IRA C. HAWLEY, and H. S. HUGHES, County Commissioners of Benton County, Washington, Defendants,

J. T. S. LYLE, DIX ROWLAND, CHARLES HEATH, T. H. BOWDEN and H. E. DAVENPORT, individually and as Trustees, Interveners, Appellees.

Appeal From the Supreme Court of the State of Washington

Brief of Appellees

HAROLD PRESTON
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L. T. TURNER
Attorneys for Appellees

INDEX

SUBJECT INDEX

	Page
STATEMENT OF THE CASE	2
THE JURISDICTIONAL QUESTION	10
THE LAW ON THE MERITS	22
I. Burden on plaintiff to establish violation of constitution	23
II. Review of cases cited by appellant on constitutional question	23
III. Citation of cases showing judgment of state court does not violate 14th Amendment	27
IV. Validity of additional assessment to make up deficiencies caused by delinquencies in payment of assessments	43
V. The matter of interest	50
CONCLUSION	51

INDEX

INDEX TO AUTHORITIES

CASES CITED

Page

Abie State Bank v. Weaver, 282 U. S. 765, 51 Sup Ct. 252---- 14
American Falls Reservoir Dist. v. Thrall, 228 Pac. 236; 39 Ida. 105; 39 Ida. 130---- 50
Arizona Copper Co. v. Hammer, 250 U. S. 400; 39 Sup. Ct. 553 ---- 10
Atchison T. & S. F. Ry. Co. v. Railroad Commission of California, 283 U. S. 380; 51 Sup. Ct. 553---- 11
Broad River Power Co. v. State of South Carolina ex rel. Daniel, 281 U. S. 537; 50 Sup. Ct. 401---- 14
Branson v. Bush, 251 U. S. 182; 40 Sup. Ct. 113---- 33
Butler v. Eaton, 141 U. S. 240; 11 Sup. Ct. 985---- 20
Cass Farm Company v. Detroit, 181 U. S. 396; 21 Sup. Ct. 644 ---- 33
Chadwick v. Kelly, 187 U. S. 540; 23 Sup. Ct. 175---- 35
Clancy v. Columbia Irr. Dist., 121 Wash. 79; 208 Pac. 27---- 49
Cosman v. Chestnut Valley Irrig. Dist., 74 Mont. 111; 238 Pac. 879; 40 A. L. R. 1344---- 44
Detroit v. Parker, 181 U. S. 399; 21 Sup. Ct. 624---- 33
Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112; 17 Sup. Ct. 56 ---- 40
French v. Barber Asphalt Paving Company, 181 U. S. 324; 21 Sup. Ct. 625---- 33
Gast Realty & Investment Company v. Schneider Granite Company, 240 U. S. 55; 36 Sup. Ct. 254---- 24
Green v. Frazier, 253 U. S. 233; 40 Sup. Ct. 499---- 11
Hagar v. Reclamation District No. 108, 111 U. S. 701; 45 Sup. Ct. 663 ---- 25
Harmon v. Auditor, 123 Ill. 122; 13 N. E. 161---- 17
Houck v. Little River Drainage District, 239 U. S. 254; 36 Sup. Ct. 58---- 28, 46
Kadow v. Paul, 134 Wash. 539; 236 Pac. 90; 274 U. S. 175; 47 Sup. Ct. 561---- 13, 27
Kollock v. Barnard, 242 Pac. 847; 116 Ore. 694---- 49
Lawrence v. State Tax Commissioner of Mississippi, 286 U. S. 276; 52 Sup. Ct. 556---- 33
Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co., 197 U. S. 430; 25 Sup. Ct. 466---- 38
McCoy v. Shaw, 277 U. S. 302; 48 Sup. Ct. 519---- 14
McIntosh v. City of Pittsburg, 112 Fed. 705---- 17
Martin v. District of Columbia, 205 U. S. 135; 27 Sup. Ct. 440 ---- 24
Miller & Lux, Inc., v. Sacramento & San Joaquin Drainage

CASES CITED—Continued

Dist., 256 U. S. 129; 41 Sup. Ct. 404 32
Myles Salt Company v. Board of Commissioners, 239 U. S. 478; 36 Sup. Ct. 204; L. R. A. 1918-E, 190 25
Nelson v. Board of Commissioners of Davis County, 218 Pac. 952; 62 Wash. 218 50
Noble v. Yancey, 116 Ore. 356; 241 Pac. 335; 42 A. L. R. 1178 49
Norris v. Montezuma Valley Irr. District, 248 Fed. 369; (Cert. den.) 248 U. S. 569; 39 Sup. Ct. 10 ..... 13, 48, 49
Northern Pacific R. R. Co. v. Seattle, 46 Wash. 674 40
Norwood v. Baker, 172 U. S. 269; 19 Sup. Ct. 187; 43 L. Ed. 444 23
Orr v. Allen, 245 Fed. 486; 248 U. S. 35; 39 Sup. Ct. 23 ..... 13, 46
Patterson v. People of the State of Colorado ex rel. Atty. General, 205 U. S. 454; 27 Sup. Ct. 556 11
People of State of New York v. Latrobe, 279 U. S. 421; 49 Sup. Ct. 377 35
Phillip Wagner, Inc., v. Leser, et al., 239 U. S. 207; 36 Sup. Ct. 66 25
Roberts v. Richland Irrigation District, 169 Wash. 156; 13 Pac. (2d) 437 ..... 5, 12
Smith v. Wilson, 13 Fed. (2d) 1007 33
Solomon v. State Tax Commissioner of New York, 278 U. S. 484; 49 Sup. Ct. 192 34
Stalleup v. Tacoma, 13 Wash. 141 ..... 17, 18
State ex rel. Brown v. Chester, etc., Co., 13 S. C. 290 17
State ex rel. Clancy v. Columbia Irrigation District, 121 Wash. 79; 208 Pac. 79 13
State ex rel. Forgues v. Superior Court, 70 Wash. 670, 127 Pac. 313 ..... 17, 18
State ex rel. Malott v. Board of Commissioners of Cascade County, 89 Mont. 37; 296 Pac. 1 45
State ex rel. Soutter v. Common Council, 15 Wis. 33 45
State ex rel. Wells v. Hartung, 150 Wash. 590; 274 Pac. 181 ..... 9, 12, 13, 16, 22, 28, 43, 45, 51
Stevens v. Melville, 175 Pac. 602; 52 Wash. 524 49
Supreme Lodge, K. P. v. Meyer, 265 U. S. 30; 44 Sup. Ct. 432 11
Tonawonda v. Lyon, 181 U. S. 389; 21 Sup. Ct. 609 31
Valley Farms Co. v. Westchester County, 261 U. S. 155; 43 Sup. Co. 261 33
Webster v. Fargo, 181 U. S. 394; 21 Sup. Ct. 623 32

STATUTES CITED

Remington's Revised Statutes of Washington:
Sections 7438-42 5
Section 7440 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 516

J. T. ROBERTS, Appellant,

vs.

RICHLAND IRRIGATION DISTRICT, an Irrigation District; C. J. BARNETT, W. A. STOCKMAN, and W. C. McINNIS, Directors of the Richland Irrigation District, an Irrigation District, and HARRY FORSYTH, Treasurer of Benton County, Washington; B. J. PACIUS, IRA C. HAWLEY, and H. S. HUGHES, County Commissioners of Benton County, Washington, Defendants,

J. T. S. LYLE, DIX ROWLAND, CHARLES HEATH, T. H. BOWDEN and H. E. DAVENPORT, individually and as Trustees, Interveners, Appellees.

Appeal From the Supreme Court of the State of Washington

Brief of Appellees

HAROLD PRESTON
O. B. THORGRIMSON
L. T. TURNER
Attorneys for Appellees

STATEMENT OF THE CASE

Appellant bases his suit, brought on behalf of himself and all others similarly situated, to enjoin the levying of assessments upon his forty-acre tract in the Richland Irrigation District upon claims made in his complaint that he has already paid assessments in excess of the benefits to his land, that the proposed levy is not made on account of or with reference to any special benefit accruing to plaintiff's property, and that the directors of the district have stated to the plaintiff that they propose to levy assessments upon plaintiff's land and other lands in the district which continue to pay their assessments until a sum sufficient has been created to pay the entire outstanding indebtedness upon the said bonds, without reference to the special benefits which have accrued to plaintiff's lands.

The foregoing claims of the appellant, however, have been in fact, as shown by the record, narrowed down to the claim that appellant is being assessed to make up deficiencies caused by the failure of other property owners of the district to pay their assessments.

To make this clear, we refer to the record as follows:

The complaint admits the formation of the district, comprising 10,000 acres in extent (Tr. 45), the decree of the court confirming the same, the incurring of an expenditure in the sum of $538,000 to pay for improvements and betterments and the issuance to pay therefor of bonds voted by the people in the district in the sum of $538,000, such bonds bearing 6% interest, payable semi-annually, the principal being payable in yearly installments commencing July 1, 1931. (Tr. 2, 3, 5.)

On page 94 of appellant's brief in the state court, it is said:

"No question is raised as to the legality of the formation of this district or of the inclusion of all lands within the district or as to the fact that the aggregate benefits equal the bonded debt." (Tr. 46.)

On page 41 of appellant's reply brief in the state court it is stated:

"It is true, as counsel suggests, that we have not contended that our land is disproportionately assessed. For the purpose of discussion, let us assume that the assessment is levied in proportion to the benefits to each individual tract, as determined by the judgment of the board." (Tr. 48.)

On page 6 of appellant's reply statement as to jurisdiction, it is stated:

"It is true, that appellant does not contend that the levy in question was not made in proportion to benefits."

The complaint further shows assessments paid by plaintiff on his 40-acre tract in various amounts for the years 1920 to 1929 inclusive amounting to $1167 and alleges that the board of directors of the irrigation district threaten to make an assessment in 1931 of $757.55 upon his land (Tr. 5, 6), paragraph XIII of the complaint alleging:

"That said assessment has been levied for the purpose of creating a fund to take up or eliminate the deficiencies in the bond interest and bond retirement funds of said irrigation district, due wholly or in part to a failure of certain landowners within the district to pay assessments which have heretofore or will hereafter be levied against lands in said district belonging to such other persons." (Tr. 6.)

The statute under which the bonds were issued and assessments levied provides that such bonds as well as all payments due or to become due to the United States or State of Washington under any contract with the district "shall be paid by revenue derived from an annual assessment upon the real property of the district and all the real property in the district shall be and remain liable to be assessed for such payments until fully paid as hereinafter provided." (Rem. Rev. St. 7434.)

The statute further provides for equalization after notice of the various assessments, such hearing being had in December of each year and the roll entirely

completed as finally equalized and filed with the county treasurer for collection on or before the 15th day of January following. (§7438-42 Rem. Rev. St.)

Section 7440 of the same statute provides that the assessment to be levied shall be sufficient to raise the ensuing annual interest on the bonds and beginning in the year preceding maturity of the first series of the bonds, a levy each year sufficient to pay such bonds as they mature. The board at the time of making the levy must also estimate the amount of all probable delinquencies and levy a sufficient amount to cover the same and a further amount sufficient to cover any deficit that may have resulted from delinquent assessments for any preceding year.

In this case it was admitted by appellant in the hearing before the supreme court and found by the supreme court in its opinion (*Roberts v. Richland Irrigation District*, 169 Wash. 156, 159), that:

"Counsel concede that the aggregate benefits to the lands within the district equal the bonded indebtedness of the district and that the lands of the appellant have been benefited to some extent. It is not contended that, as between appellant's land and other privately owned land, the former is disproportionately assessed."

Notwithstanding the broad allegations of the complaint, it is, of course, apparent that if the benefits to the whole district equal the bonded indebtedness,

and if assessments are made against appellant's property in the proper proportion for the purpose of paying that bonded debt, that there would be sufficient sum to pay the whole bonded debt were it not for deficiencies in collection, and that, therefore, the whole difficulty of which plaintiff complains is that there have been deficiencies in collection of assessments against other lands and that as required by the statute these deficiencies have been computed by the commissioners and future deficiencies estimated, and included in the assessment of which appellant complains.

Counsel, on page 10 of appellant's brief, states the question before the court as we have stated it, except that he states that the assessments were levied by the district "solely for the purpose of paying for benefits conferred upon the lands of others in the district, who have defaulted in their payments."

We are unable to agree with this statement.

In the first place, our supreme court has held that in addition to the primary benefit arising from the improvement, there is a secondary benefit arising from the acquisition of title to lands by the district for unpaid assessments and also from the uncollected delinquent assessments for which sales have not been made.

And in the second place, the purpose of the additional assessment upon appellant's lands was not in order to pay for the benefits of any other land owner, but its purpose was to meet the emergency created by the unexpected default of some land owners to pay their assessments, and, in the last analysis, was for the benefit of the land owner himself, in that without a provision in the law requiring such additional assessment to meet deficiencies, the borrowing of money upon bonds and the construction of the irrigation works would have been originally impossible.

In our statement against jurisdiction heretofore filed herein appellees set forth certain other facts contained in the briefs on file in the state supreme court, and so far as that court is concerned we think there can be no doubt that it had a right to assume that such facts were admitted. Appellant in his reply statement for jurisdiction now says that the briefs filed in the state supreme court are not properly a part of the record in the United States Supreme Court and therefore should not be considered, and argues that appellees now concede that his complaint does state a cause of action but seek to avoid a reversal by substituting an entirely different state of facts which does not appear in the record. This is not correct as we do not concede any cause of action,

nor do we ask the case to be decided on anything but the pertinent facts proper to be considered. In his opening statement as to jurisdiction in order to sustain his position appellant quoted from his own briefs in the state supreme court and cited authority to sustain the right to have such quoted matter considered by this court. We are perfectly willing that this be done but of course if considered for his benefit the same rule applies to appellees. Judges and trial lawyers alike are acquainted with the fact that very frequently questions of law are decided not only on the written record but on admissions of counsel made during argument, and we submit therefore that this court has a right to and should place itself in as near the exact position as possible that the state supreme court was in when it ruled on the case. However, taking the complaint alone, together with the opinion of the state supreme court in the *Roberts* case, we do not think appellant has stated a cause for relief under the 14th Amendment.

In the first place, appellant admits the validity of the organization of the district and the issuance of the bonds and the fact that at the time of such issuance the property in the district was benefited in the total aggregate of the bond issue; that his property received some benefit and has not been dispropor-

tionately assessed. It therefore must be considered as an admitted fact that at the time of the various levies paid or complained of by appellant the other properties in the district were also assessed in proportion to benefits. Taking into consideration the fact that appellant does not allege in his complaint what part of any of these levies is for principal, and the further fact that under the state law no levy at all had to be made for principal until the fall of 1930, we think we have a right to assume that all of the assessments levied and paid for the years 1920 to 1929 inclusive were for interest alone. In addition, from the opinion in *State ex rel. Wells v. Hartung*, 150 Wash. 590, involving the right to levy assessments for 1928 upon the lands in the Richland District, that being the case which was the basis for the decisions of both the trial and state supreme court in this case, it is disclosed that all levies made in the district for 1928 and previous years were for interest alone and were not in fact sufficient for that purpose alone. So, if extracts from the briefs certified in the record herein are not to be considered, the most that appellant can claim is that some undisclosed part of the 1929 assessment of $90 paid by him on his 40 acres, and of the $757 levy threatened to be made in 1930 might have been for principal. Appellant does not show that he filed any protest against any of the

yearly assessment rolls when they came up for apportionment and he now asks the court to grant him relief upon his bare assertion that the only portion of the $538,000 of bonded indebtedness for which he received benefits was the sum of $350, and that inasmuch as he has paid more than that sum in assessments without showing how much of such assessments so paid was for principal, that his land is now being assessed for an amount beyond benefits received.

If, however, we take the admissions of appellant and finding of the state supreme court that the entire 10,000 acres in the district were benefited in the total amount of the bonded indebtedness and that his lands have not been assessed disproportionately, then of course his benefits have not been used up as assessments, for only a small portion of the principal and interest of the bonds has yet been levied.

THE JURISDICTIONAL QUESTION

The burden is upon appellant to clearly establish the jurisdiction of this court and if the record is so ambiguous and conflicting that it does not certainly and clearly appear that a federal question was directly involved he must fail. (*Arizona Copper Co. v. Hammer*, 250 U. S. 400, 39 S. Ct. Rep. 553.) This court has stated that there is a presumption in view of the ruling in favor of the state court and only clear

usurpation warrants interference by this court. (*Green v. Frazier*, 253 U. S. 233, 40 S. Ct. Rep. 499.) It is further a principle of law about which there is no question that the decisions of the state court as to the meaning of its laws are conclusive (*Atchison T. & S. F. Ry. Co. v. Railroad Commission of Calif.*, 283 U. S. 380, 51 S. Ct. Rep. 553) and the fact that such decision may be considered contrary to its previous decisions does not present a federal question. *Patterson v. People of the State of Colorado ex rel. Atty. General*, 205 U. S. 454, 27 S. Ct. Rep. 556.

It is further the holding of this court that it will accept the meaning of a state statute as found by the state court the same as though such meaning was expressed in the statute itself, even if contrary to this court's opinion on the subject. *Supreme Lodge, K. P. v. Meyer*, 265 U. S. 30, 44 S. Ct. Rep. 432.

The Washington State Supreme Court has expressly found that under the state statute irrigation bonds are a general obligation of the district and the land owner is not entitled to a segregation of his share of the obligation and that by the confirmation proceedings had after the organization of the district and the issuance of bonds it is conclusively presumed that the land in the district is benefited in the amount of the total bonded indebtedness.

State ex rel. Wells v. Hartung, 150 Wash. 590;

Roberts v. Richland Irrigation District, 169 Wash. 156.

The question then resolves itself down to this: Is the fact that the district board is attempting to assess appellant's land for deficiencies caused by other property not paying their assessments, sufficient to show a violation of the 14th Amendment when coupled with the assertion that appellant has already paid in assessments (not showing what part was for the principal of the bonds) more than actual benefits received? It seems that this court in view of the admissions as to the total benefits received by the district and the fact that appellant's property is not disproportionately assessed and the conclusive presumption as found by the state court that the property in the district is benefited in the full sum of the bonded indebtedness, has a right to disregard the bare assertion that all special benefits to appellant's land have already been used up in assessments. The provision of the act that the district has a right to assess deficits caused by some of the properties not paying their assessments, upon the remaining property, has been directly upheld by the state supreme court in *Kadow v. Paul*, 134 Wash. 539, and *State ex rel. Wells v. Hartung*, 150 Wash. 590, as well as by this

court in the case of *Kadow v. Paul*, 274 U. S. 175, 47 S. Ct. Rep. 561. This same principle was applied in the case of *Norris v. Montezuma, etc., District*, 248 Fed. 369, holding that an additional levy could be made on all the property in the district because of the failure of some of the taxpayers to pay their levies.

And in *Orr v. Allen*, 248 U. S. 35, 63 L. Ed. 109, 39 Sup. Ct. 23, this court sustained with hearty approval the decision of the District Court of the Southern District of Ohio sustaining such a deficiency assessment notwithstanding the fact that the complaining property owner had already paid his full assessment on an appraisement for benefits. In principle the case (which we will discuss more fully in Paragraph IV of this brief) is on all fours with the case at bar.

In view of the fact that appellant says in his reply statement as to jurisdiction (p. 6) that he does not contend that the levy in question was not made in proportion to benefits and considering the holding in the case of *State ex rel. Clancy v. Columbia Irrigation District*, 121 Wash. 79, that irrigation assessments must be spread upon the lands acquired by the county through tax sale and the lands acquired by the district on delinquent irrigation assessment sales, it is clear

that appellant has received exactly the same treatment as all of the remaining property in the district and if his assessment is not sustained then all other assessments must necessarily fail and the net result would be that no part of the principal of the bonded indebtedness will be paid, although it is admitted by appellant and found by the state court that the district lands as a whole received benefits in an amount equal to the total bonded indebtedness.

The fact that those lands that do pay their assessments may temporarily have to carry a portion of the load imposed upon other property does not show an illegal assessment, especially as all of the lands which through delinquency come into district ownership are held for the benefit of the entire district and theoretically at least, the amount of all assessments so levied upon such delinquent lands will be realized from the sale thereof.

Even if a federal question is found to be present, it is the law if there is also present a non-federal ground which supports the judgment of the state court, this court will not take jurisdiction. *McCoy v. Shaw*, 277 U. S. 302, 48 S. Ct. Rep. 519; *Abie State Bank v. Weaver*, 282 U. S. 765, 51 S. Ct. Rep. 252. And this court will not inquire whether the state court decision on the non-federal ground is right or wrong where the

federal question is not evaded. *Broad River Power Co. v. State of South Carolina ex rel. Daniel*, 281 U. S. 537, 50 S. Ct. Rep. 401.

We submit that the opinion of the state court in the *Roberts* case shows such a non-federal ground present and actually decided. The opinion says:

"The benefits to the appellant's lands are not only the benefits accruing by reason of the improvements for the payment of which the district issued bonds in the amount of five hundred and thirty-eight thousand dollars. Lands acquired by the district for unpaid assessments are assets of the district. An added benefit therefrom accrues to the district as a whole and to each landowner individually. Such benefit is a basis, as are the unpaid assessments on other lands within the district, for the secondary liability to which reference is made in *State ex rel. Wells v. Hartung*, *supra*.

" 'While appellants argue that interest cannot be considered as part of the benefits for which assessments may be levied, when any lands within the district have paid as much as the total benefits, yet every tract of land within the district became then liable, not only for the principal as the amount of the benefits, but for the interest. Since it was heretofore so judicially determined, the directors have no option, under the statute quoted, but to levy assessments as the statutes specify.

" 'Nor have the land owners any right to question the assessments on the theory that they have paid assessments equalling the total amount of their benefits. The lands passing into the ownership of the district are not to be considered as liabilities, but assets. It may be that, during periods of depression in the market value of such lands, such as have pre-

vailed for some years, the lands do not appear to be assets. Their temporary exclusion from liability to pay assessments is anticipated by the provisions of the statutes we have quoted. These observations apply to intervenors Schlagel and others similarly situated, as well as to the directors of the district, in the operation of the law.'" *Roberts v. Richland Irrigation Dist.*, 169 Wash. 161.

Further on page 164 of the opinion in this case the state court held that *State ex rel. Wells v. Hartung*, 150 Wash. 590, is determinative of the case at bar. It is thus apparent from the holdings in both the *Hartung* and *Roberts* cases that the court actually found that the property owners, including the appellant, as a matter of fact received benefits sufficient to sustain the levy of the assessment in question. Further, in the *Hartung* case the opinion shows that exactly the same contest being waged here was there waged by intervening land owners appearing for themselves and all other parties similarly interested. Exactly the same allegation as to parties is contained in the complaint in the case at bar. In the *Hartung case* the assessment levied for the year 1928 was involved and the opinion shows that the intervening land owners alleged that prior to said year they had already paid in assessments levied upon their properties more than the total amount of special benefits received, and therefore the 1928 assessment was invalid,—exactly the same question as is raised by

appellant herein. The court held directly against their contention.

It is of course well established law that in actions of this kind an adverse decision in a suit by a party bringing the action on behalf of himself and others similarly situated is a bar to a subsequent action involving the same matter brought by another party within the class bringing the first action.

See:

State ex rel. Brown v. Chester, etc., Co., 13 S. C. 290;

Harmon v. Auditor, 123 Ill. 122, 13 N. E. 161;

Stallcup v. Tacoma, 13 Wash. 141;

State ex rel. Forgues v. Superior Court, 70 Wash. 670;

McIntosh v. Pittsburg, 112 Fed. 705.

From the allegations in appellant's complaint it appears he was a property owner in the district when the property owners' intervening complaint was filed in the *Hartung* case, and beyond all question he stands exactly in the shoes of the interveners in that case. The claim that the finding in the *Hartung* case was an adjudication binding upon appellant in the case at bar was raised by appellees in the state supreme court, and we submit that the finding of the state su-

preme court in the *Roberts* case that the *Hartung* case is determinative of appellants' claim, amounts to a holding that appellant was bound by the prior adjudication.

In the case of *Stallcup v. Tacoma*, 13 Wash. 141, the court held:

"A decision of the supreme court determining the legality of municipal bonds, in an action by a taxpayer in behalf of himself and all others similarly situated to restrain the city from issuing the bonds, is, in the absence of fraud or collusion, conclusive of their validity in a subsequent action by another taxpayer to restrain the city from paying interest thereon, especially when it appears from the records in the former action that the same questions involving the legality of the bonds were presented to the consideration of the court in both actions."

Also see *State ex rel. Forgues v. Superior Court*, 70 Wash. 670.

We are not unmindful of the general rule that the defense of *res judicata* must be pleaded and proved, but as is apparent from the *Stallcup* case, it is not always strictly adhered to when the facts are unquestioned and much expense and delay will be avoided by the court taking judicial notice of its own records. It is true as stated by appellant in his reply statement as to jurisdiction that there are cases holding that a trial court will not judicially notice the record in another case and that an appellate court notices

judicially those matters that the trial court is obliged to notice. In this case, however, the trial court did note the holding of *State ex rel. Wells v. Hartung* and decided in favor of appellees solely on the strength of that case, and we therefore submit that on the facts the cases cited by appellant on this point disclose a different condition of affairs, and therefore we are warranted in maintaining that the rule in the *Stallcup* case, to-wit:

> "This court will take judicial notice of its records and of what issues were presented for determination by the record in a given cause and will not entertain or consider an allegation of the character contained in paragraph seven of the complaint herein when it appears from an inspection of such record that the matters so alleged are unfounded,"

was, by the holding that the *Hartung* case was determinative of the case at bar, impliedly followed and applied by the state supreme court.

An examination of the cases cited by appellant show that they do not overrule the *Stallcup* case. While the *Stallcup* case is sometimes distinguished in later cases on the ground that a different state of facts existed, the principle there laid down is impliedly recognized as still being in effect and we are therefore warranted in asserting it is the law in the state of Washington.

The *Stallcup* case is also supported by the case of *Butler v. Eaton*, 141 U. S. 240, 11 S. Ct. Rep. 985, in which the United States Supreme Court took judicial notice of the reversal by it of a judgment which had been pleaded in bar in the federal trial court, notwithstanding the fact that there was no pleading or proof of the reversal. The court discussed at some length its right to take judicial notice of this reversal, saying as follows:

"We think, therefore, that the evidence of the judgment recovered was properly admitted as a bar to the receiver's title to recover in reference to the new stock. And it cannot be said, therefore, looking to the record in this case alone, that there is error in the judgment now before us. But, by our own judgment just rendered in the other case, the whole basis and foundation of the defense in the present case, namely, the judgment of the supreme judicial court of Massachusetts, is subverted and rendered null and void for the purpose of any such defense. While in force, an execution issued upon it, and a sale of property under such execution would have been effective. And when it was given in evidence in this case it was effective for the purpose of a defense, but its effectiveness in that regard is now entirely annulled. Are we, then, bound to affirm the judgment, and send it back for ulterior proceedings in the court below, or may we, having the judgment before us, and under our control for affirmance, reversal, or modification, and having judicial knowledge of the total present insufficiency of the ground which supports it, set it aside as devoid of any legal basis, and give such judgment in the case as would and ought to be rendered upon a writ of error *coram vobis, audita querela*, or other proper proceedings for revoking a judgment which has be-

come invalid from some extraneous matter? * * * The judgment complained of is based directly upon the judgment of the supreme judicial court of Massachusetts, which we have just reversed. It is apparent from an inspection of the record that the whole foundation of that part of the judgment which is in favor of the defendant is, to our judicial knowledge, without any validity, force, or effect, and ought never to have existed. Why, then, should not we reverse the judgment which we know of record has become erroneous, and save the parties the delay and expense of taking ulterior proceedings in the court below to effect the same object? Upon full consideration of the matter, we have come to the conclusion that we may dispose of the case here."

Nor do we think that the claim of appellant that the questions raised in this case may be of vital interest to thousands of ranchers and that bondholders are the only ones objecting to the jurisdiction because it prevents their illegal exaction, is any reason for sustaining jurisdiction. The equities are not one-sided. Irrigation bonds are held by all classes of people throughout the United States, and the moneys realized therefrom were used for the benefit of the land owners. To now hold that land owners are not bound by any previous adjudication as to benefits and are entitled in these times of depressed values to have a new finding as to benefits, is of course to utterly destroy the value of all irrigation bonds.

THE LAW ON THE MERITS

In discussing the legal questions involved on the main question it has seemed to us unnecessary to discuss the various decisions by the Supreme Court of the State of Washington which counsel seems to contend are inconsistent with the doctrine of the decision of the supreme court in the case at bar. Whatever prior decisions may have been rendered by our supreme court the law as to the character of the irrigation assessments involved in this case is fixed by the decision in the case at bar and the decision involving the validity of earlier assessments in the same district which it followed, that of *State ex rel. Wells v. Hartung*, 150 Wash. 590.

So also as to the question discussed at some length in appellant's brief as to whether or not irrigation assessments in the State of Washington are in their nature local improvement assessments or whether they are based upon the taxing power and not solely upon benefits, we are disposed largely to ignore. Our supreme court has supported the assessments made here and it is our view that whether they be regarded as strictly special assessments based on the theory of special benefits to the land alone or whether they be based upon the general tax power they do not violate the provision of the 14th Amendment.

I.

Where a state law is attacked as violating the 14th Amendment to the Constitution of the United States, the plaintiff has the burden of demonstrating that the law is clearly unreasonable and arbitrary.

Arizona Copper Co., Ltd. v. Hammer, 250 U. S. 400, 30 S. Ct. 553.

Lawrence v. State Tax Commissioner of Mississippi, 286 U. S. 276, 52 S. Ct. 556.

II.

The authorities cited by counsel to the proposition that the assessment involved here is a violation of the 14th Amendment are found on page 41 and immediately following pages of appellant's brief.

The first case cited is that of *Norwood v. Baker*, 172 U. S. 269, 279; 19 S. Ct. 187; 43 L. Ed. 443. It is true that in the case of *Norwood v. Baker* this court said that the exaction from the owner of private property of the cost of a public improvement in any substantial excess of the special benefits accruing to him is to the extent of such excess a taking under the guise of taxation of private property for public use without compensation. This doctrine, however, was laid down in the flagrant case of an arbitrary assessment against the remainder of property (part of

which was taken by eminent domain), of the whole award made for the taking and the costs of the improvement of the street and the condemnation costs and without any opportunity to the property owner to be heard. In a number of cases decided by this court since the decision of *Norwood v. Baker* it would seem to be clear that the doctrine of the case as above stated and as contended for by counsel for appellant would not be applied except in a case of such flagrant abuse and oppression.

The next case cited by counsel in support of this point is the case of *Gast Realty and Investment Co. v. Schneider Granite Co.*, 240 U. S. 55; 36 S. Ct. 254. This case is one of equally flagrant injustice in which assessments were sought to be laid in the city of St. Louis for paving a street, the assessments being levied at some parts of the street to a depth of 100 feet and, immediately adjoining, to a depth of 400 and 500 feet, and on the opposite side of the street to a depth of 150 feet. This court held that the inequalities were so gross between the various property owners as to make the assessment void.

The next case cited is that of *Martin v. District of Columbia*, 205 U. S. 135; 27 S. Ct. 440. This was a case involving assessments in the District of Columbia to which the 14th Amendment to the Constitution

does not apply, and while the case of *Norwood v. Baker* and its rule was cited and referred to the case was decided on the construction of the statute applicable to the assessment in question.

The next case cited by counsel is that of *Hagar v. Reclamation District No. 108*, 111 U. S. 701; 4 S. Ct. 663. We find nothing in this case which supports counsel's position.

The next case cited is that of *Myles Salt Co., Inc., v. Board of Drainage Dist.*, 239 U. S. 478; 36 S. Ct. 204; L. R. A. 1918 E, 190. In this case this court held a drainage district assessment to be invalid under the 14th Amendment. The assessment was for drainage purposes. It was levied upon an island consisting of high land needing no drainage whatever, its problem being against washing and erosion, and the court found that the fact was that it was put in the drainage district solely with the view of deriving revenues from the assessment of Weeks Island and the salt deposit therein and only for the benefit of other properties.

The next case cited by counsel is that of *Phillip Wagner, Inc., v. Leser, et al.*, 239 U. S. 207; 36 S. Ct. 66, and involved a paving assessment, attacked as violating the 14th Amendment.

The court, in refusing to interfere with the assessment, said:

"In Spencer v. Merchant, 125 U. S. 345, 356, 31 L. Ed., 763, 768, 8 S. Ct. Rep. 921, this court, speaking by Mr. Justice Gray, said:

" 'In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the state, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners.' [Here the court cites many cases, including *Norwood v. Baker.*] Norwood v. Baker, supra, is much relied upon by the plaintiff in error, and while this court has shown no disposition to overrule that case when limited to the decision actually made by the court, much that is said in it must be read in connection with the subsequent cases in this court already referred to. In Norwood v. Baker, a portion of a person's property, located in a village of Ohio, was condemned for street purposes, and the entire cost of opening the street, including the amount paid for the strip condemned, with the costs and expenses of condemnation, was assessed upon the abutting property owner whose land was condemned. This, it was said in French v. Barber Asphalt Paving Co., supra, was an abuse of the law and an act of confiscation, and not a valid exercise of the taxing power. Taking the decisions in this court together, we think that it results that the legislature of a state may determine the amount to be assessed for a given

improvement, and designate the lands and property benefited thereby, upon which the assessment is to be made, without first giving an opportunity to the owners of the property to be assessed to be heard upon the amount of the assessment or the extent of the benefit conferred.

"We do not understand this to mean that there may not be cases of such flagrant abuse of legislative power as would warrant the intervention of a court of equity to protect the constitutional rights of landowners, because of arbitrary and wholly unwarranted legislative action."

Appellant cites the case of *Kadow v. Paul*, 274 U. S. 175, 71 L. Ed. 982, 47 Sup. Ct. 561, and quotes on page 81 of his brief the following language:

"When the operation of the law works uniformly as against all parts of the assessment district and results in a higher cost of the improvement, and an increased assessment on all the owners of land who have paid, it violates no constitutional right of theirs as long as their benefits continue respectively to exceed their individual assessments."

An examination of that case will show that there was no contention that the assessments exceeded the individual benefits, and therefore the language of the last part of the quotation was not necessary to the decision and is therefore *dictum*.

III.

The situation in the case at bar is not like that passed upon by this court in those cases in which

the state statute has been held invalid as taking property without due process of law. Here there is no inequality between land owners, all being treated alike. So far as any assessment may exceed actual benefit resulting from the improvement itself, it is a contribution for temporary purposes and on account of unexpected emergencies arising in the administration of the affairs of the district. The added assessment is balanced by an additional benefit to the property arising from the unpaid delinquent assessments and the value of land bid in by the district as found by our supreme court in the case at bar and in the case of *Wells v. Hartung*, 150 Wash. 590. This point we will discuss later.

In any event it is not a case of arbitrary or capricious action or discriminatory in its operation. We submit that under numerous decisions of this court, most of them rendered since the decision in *Norwood v. Baker*, the irrigation law of the State of Washington under attack here does not violate the 14th amendment to the constitution of the United States.

In the case of *Houck v. Little River Drainage District*, 239 U. S. 254, 36 Sup. Ct. 58, there was involved the validity of a per acre tax upon lands within a drainage district, which tax was attacked as invalid because the land of the property owners bring-

ing the suit would not be benefited by the proposed improvement. The court held that the law was not invalid, saying in the opinion:

."The ultimate contention, then, is that the plaintiffs in error cannot be subjected to this preliminary tax of 25 cents an acre because their lands, as they insist, will not be benefited by the plan of drainage. In authorizing the tax, it is said, the legislature has departed from the principle of benefits and the tax is asserted to be protanto an uncompensated taking of their property for public use. But the power of taxation should not be confused with the power of eminent domain. Each is governed by its own principles. Mobile County v. Kimball, supra; Bauman v. Ross, 167 U. S. 548, 590, 42 L. Ed. 270, 288, 17 Sup. Ct. Rep. 966; Wright v. Davidson, 181 U. S. 371, 379, 45 L. Ed. 900, 904, 21 Sup. Ct. Rep. 616; People ex rel. Griffin v. Brooklyn, 4 N. Y. 419, 424, 55 Am. Dec. 266; Cooley, Taxn. p. 430; Lewis, Em. Dom. 3d Ed., §§ 4, 5. A tax is an enforced contribution for the payment of public expenses. It is laid by some rule of apportionment according to which the persons or property taxed share the public burden, and whether taxation operates upon all within the state, or upon those of a given class or locality, its essential nature is the same. The power of segregation for taxing purposes has every-day illustration in the experiences of local communities, the members of which, by reason of their membership, or the owners of property within the bounds of the political subdivision, are compelled to bear the burdens of both of the successes and of the failures of local administration. When local improvements may be deemed to result in special benefits, a further classification may be made and special assessments imposed accordingly; but even in such case there is no requirement of the Federal Constitution that for every payment there must be an equal benefit. The state in its discretion may lay such as-

sessments in proportion to position, frontage, area, market value, or to benefits estimated by commissioners. (Citing cases.) And, as we have said, unless the exaction is a flagrant abuse, and by reason of its arbitrary character is mere confiscation of particular property, it cannot be maintained that the state has exceeded its taxing power. Wagner v. Leser, 239 U. S. 207, 60 L. Ed. —, 36 Sup. Ct. Rep. 66. We find no such arbitrary action here. It was not necessary to base the preliminary tax upon special benefits accruing from a completed plan. It cannot be denied that the preliminary work had peculiar relation to the district. The initial inquiry, whatever its result, was for the purpose of securing the reclamation of the lands of which the district was comprised. In this inquiry, all the owners were interested. *Whether the expense of ascertaining the best method of reclamation should subsequently be reimbursed when final assessments were laid according to benefits ascertained to result from the execution of the final plan presents a question of policy, and not of power.* These outlays for organization and preliminary surveys could as well be considered specially to concern the district, as constituted, as highways or public buildings or plans for the same (whether consummated or abandoned) could be said to concern counties or towns. Further, it would seem to be clear that the state could appropriately provide for meeting the preliminary expense when it was incurred, and could determine the manner of apportionment according to the interests deemed to be affected as they existed at the time. And in this view, it is not material to consider whether the area of the district might subsequently be extended, or what particular lands within it would be appropriated for ditches, reservoirs, etc., if a plan of drainage were adopted and carried out. To say that the tax could not be laid except as a result of such an inquiry would be to assert in effect that as a preliminary tax it could not be laid at all.

We know of no such limitation upon the state power. And assuming that the lands within the district, as organized, could be taxed for the purpose stated, there was manifestly nothing arbitrary in the fixing of the prescribed rate per acre." (Italics are ours).

In the case of *Tonawanda v. Lyon*, 181 U. S. 389, 21 Sup. Ct. 609, there was involved an assessment for paving levied by the front foot pursuant to a law of the state of New York, it being claimed that a statute providing for such an assessment without provision for a judicial inquiry into the value of the lands and the benefits actually to accrue to them by the proposed improvement, was unconstitutional under the 14th amendment to the United States Constitution, the claimants basing their claim on *Norwood v. Baker*, above cited. The court in denying the claim said:

"It was not the intention of the court, in that case, to hold that the general and special taxing systems of the states, however long existing and sustained as valid by their courts, have been subverted by the 14th Amendment of the Constitution of the United States. The purpose of that Amendment is to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property, as is afforded by the 5th Amendment against similar legislation by Congress. The case of *Norwood v. Baker* presented, as the judge in the court in the present case well said, 'considerations of peculiar and extraordinary hardships' amounting, in the opinion of a majority of the judges of this court, to actual confiscation of private

property to public use, and bringing the case fairly within the reach of the 14th Amendment.

"The facts disclosed by the present record do not show any abuse of the law, nor that the burdens imposed on the property of the complainant were other than those imposed upon that of other persons in like circumstances; and it is obvious, from expressions in the opinion of the trial judge, that he reached his conclusion because constrained by what he understood to be the principle established by the *Norwood Case*."

In Webster v. Fargo, 181 U. S. 394, 21 Sup. Ct. 623, which involved also an assessment by the front foot rule for grading and paving, this court said:

"It is conceded in this record that the plaintiff in error has no ground to complain of any discrimination attempted against him, either in the statutes of the state or in the proceedings thereunder, whereby the tax in question was assessed against his property. The sole contention on his behalf is that, under the decision of this court in the case of *Norwood v. Baker*, 172 U. S. 269, 43 L. Ed. 443, 19 Sup. Ct. Rep. 187, all special assessments upon the basis of frontage are in violation of the 14th Amendment to the Constitution of the United States, in that they may result in the taking of property without due process of law.

"But we agree with the supreme court of North Dakota in holding that it is within the power of the legislature of the state to create special taxing districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said district, either according to valuation or superficial area or frontage, and that it was not the intention of this court, in *Norwood v. Baker* to hold otherwise."

In the case of *Miller & Lux, Inc., v. Sacramento & San Joaquin Drainage Dist.*, 256 U. S. 129, 41 Sup.

Ct. 404, there was drawn in question an assessment for the preliminary expenses incident to the establishment of a drainage district, the plaintiff contending that its lands would receive no special or direct benefits from the proposed works and that therefore the assessment conflicted with the 14th Amendment. In deciding the case the court said:

"* * * Since Houck v. Little River Drainage District (1915), 239 U. S. 254, 36 Sup. Ct. 58, 60 L. Ed. 266, the doctrine has been definitely settled that in the absence of flagrant abuse or purely arbitrary action a state may establish drainage districts and tax lands therein for local improvements, and that none of such lands may escape liability solely because they will not receive direct benefits."

The following cases adopt and follow the rule of the above cases and the limitation of the doctrine of *Norwood v. Baker* established by those cases:

Detroit v. Parker, 181 U. S. 399, 21 Sup. Ct. 624;

French v. Barber Asphalt Paving Company, 181 U. S. 324, 21 Sup. Ct. 625;

Cass Farm Company v. Detroit, 181 U. S. 396, 21 Sup. Ct. 644;

Bronson v. Bush, 251 U. S. 182; 40 Sup. Ct. 113;

Valley Farms Co. v. Westchester County, 261 U. S. 155, 43 Sup. Ct. 261;

Smith v. Wilson, 13 Fed. (2d) 1007.

In the case of *Lawrence v. State Tax Commissioner of Mississippi*, 286 U. S. 276, 52 Sup. Ct. 556, there was drawn in question the validity of certain provisions of the Mississippi income tax law as infringing the 14th Amendment of the United States Constitution. The law was unequal as between individuals and corporations, the income tax being levied as to corporations exclusive of their income earned from sources without the state and including as to individuals income earned outside the state. The court held the law not invalid under the 14th Amendment. We quote from the syllabus of the case as follows:

"State income tax statute relieving domestic corporations, but not individuals, from tax on income derived from activities carried on outside state, held not to deny equal protection (Code Miss. 1930, §5033, subd. b; Const. U. S. Amend. 14).

* * *

"Equal protection clause does not require state to maintain rigid rule of equal taxation, to resort to close distinctions, or to maintain precise scientific uniformity (Const. Amend. 14)."

In the case of *Salomon v. State Tax Commissioner of New York*, 278 U. S. 484, 49 Sup. Ct. 192, there was drawn in question the validity under the 14th Amendment of a provision of the New York transfer law for taxing the transfer of contingent remainders, and this court in holding against the contention, said:

"Several other reasons are urged why the statute should be held obnoxious to the equality clause. It is said that, the tax being graduated according to amounts, there will result from the use of mortality tables discrimination between members of the same class. It is urged that, since the tax is not collected until the termination of the life estate, a more perfect equality would be achieved by assessing the tax on the value of the remainder, after deducting the value of the life estate, and allowing interest to the state for the actual known period during which the tax was withheld. The fact that a better taxing system might be conceived does not render the law invalid. As was said in Metropolis Theatre Co. v. Chicago, 228 U. S. 61, 69, 70, 33 S. Ct. 441, 443 (57 L. Ed. 730): 'To be able to find fault with a law is not to demonstrate its invalidity. * * * The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' Further, it is said that postponing payment of the tax will prove burdensome, because it involves giving security to ensure the deferred payment, and that where the security is given by the deposit of cash, the income earned thereon will probably be less than would have been earned if the money had been otherwise employed. To all such objections it may be answered that minor inequalities and hardships are incidents of every system of taxation and do not render the legislation obnoxious to the Federal Constitution."

To same effect see *People of State of New York v. Latrobe*, 279 U. S. 421, 49 Sup. Ct. 377.

In the case of *Chadwick v. Kelly*, 187 U. S. 540, 23 S. C. 175, involving a paving assessment under the laws of the State of Louisiana, based on the front

foot, the court in holding that the law did not violate the 14th Amendment of the Federal Constitution, said:

"In the opinion of the Supreme Court of Louisiana, which we find in this record, it is said:

" 'There can be no question, and in fact it is conceded, that by act No. 119 of 1886, and by that act as amended by act No. 142 of 1894, the council of the city of New Orleans was authorized, "in its discretion, to provide for the paving or banqueting of any street, or portion thereof, at the expense of the whole city, and to thereupon force, impose, and collect of the front proprietors of lots fronting on said street a special assessment in proportion to frontage of three quarters of the cost of said improvement," and that by said acts it was enacted that such local assessment should have a first privilege, superior to vendor's privilege and all other privileges and mortgages.

" 'The constitutionality of those acts is not attacked directly, but the exercise by the city of authority, under the powers so granted, is called in question as being illegal and unconstitutional. . . . . It is too late to question the right of the general assembly to establish particular districts for the attainment of special local public good, through works of a particular character, and to order itself, or authorize some political body to order, special assessments to be made, within the district, for the purpose of meeting the cost and expenses of such works. *George v. Young*, 45 La. Ann. 1232, 14 So. 137. . . . It is true that in some instances almost the whole benefit accrues to a few, but there can be no universal rule of justice, upon which such assessments can be made. An apportionment of the cost that would be just in one case would be oppressive in another. For this reason the power to determine when a special assessment shall be made, and on what basis it shall be

apportioned, rests in the legislature or some political body to which it has delegated that authority. . . . . The city has simply exercised its unquestionable right and power of paving an existing public street in the interest of the special local public benefit, and demanded of owners of property abutting and fronting on the street, that they contribute to the cost of the improvement in a manner and form and to an extent fixed by the general assembly. The object of the paving of the street was to benefit parties owning property upon it by the improvement of the access to their properties. It is not pretended that this particular purpose was not accomplished even as to appellant's property. It cannot be exacted for the purpose of sustaining the constitutionality of a statute or ordinance authorizing a work of local public improvement, at the cost of abutting owners, that it be shown there is benefit in every possible respect to the particular owners, nor that the benefit be direct and immediate. . . . . The general assembly has, in Act No. 119 of 1886, conferred upon the common council the right and power by a two-thirds vote, to constitute any particular street which it proposes to pave a special taxing district for the purpose of meeting the cost of making such paving. It has exercised this right and power in the matter of the paving of Hagen avenue. Having done so, the legislature itself has designated how, in what proportion, and by what standard this cost is to be met. The council was not at liberty to depart from this apportionment. The judiciary is not authorized to alter it and to substitute for a fixed legislative standard a fluctuating judicial standard based upon actual benefits received and measured by values or enhanced values to be established by evidence and proof.'

"We think these views are consonant with the great weight of authority, both state and Federal. As expressed by Cooley in his work on Taxation, page 429:

"The matter 'is wisely confided to the legislature, and could not, without the introduction of some new principle in representative government be placed elsewhere. With the wisdom or unwisdom of special assessments when ordered in cases in which they are admissible, the courts have no concern, unless there is plainly and manifestly such an abuse of power as takes the case beyond the just limits of legislative discretion.' "

In the case of *Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 25 S. C. 466, in which a lot in the city of Louisville, Ken., used for right of way of the appellant railroad's railway was assessed for grading, curbing and paving the street upon which the lot abutted, the assessment under the state law was made by the front foot. It was contended that the property was not only not benefited, but was damaged by the improvement. This court in holding the assessment did not violate the 14th Amendment of the Constitution said:

"The argument for the plaintiff in error oscillates somewhat between the objections to the statute and the more specific grounds for contending that it cannot be applied constitutionally to the present case. So far as the former are concerned they are disposed of by the decisions of this court. There is a look of logic when it is said that special assessments are founded on special benefits, and that a law which makes it possible to assess beyond the amount of the special benefit attempts to rise above its source. But that mode of argument assumes an exactness in the premises which does not exist. The foundation of this familiar form of taxation is a question of theory. The

amount of benefit which an improvement will confer upon particular land—indeed, whether it is a benefit at all—is a matter of forecast and estimate. In its general aspects, at least, it is peculiarly a thing to be decided by those who make the law. The result of the supposed constitutional principle is simply to shift the burden to a somewhat large taxing district,—the municipality,—and to disguise, rather than to answer, the theoretic doubt. It is dangerous to tie down legislatures too closely by judicial constructions not necessarily arising from the words of the Constitution. Particularly, as was intimated in Spencer v. Merchant, 125 U. S. 345, 31 L. Ed. 763, 8 Sup. Ct. Rep. 921, it is important for this court to avoid extracting from the very general language of the 14th Amendment a system of delusive exactness in order to destroy methods of taxation which were well known when that amendment was adopted, and which it is safe to say that no one then supposed would be disturbed. It now is established beyond permissible controversy that laws like the one before us are not contrary to the Constitution of the United States. * * * *

"A statute like the present manifestly might lead to the assessment of a particular lot for a sum larger than the value of the benefits to that lot. The whole cost of the improvement is distributed in proportion to area, and a particular area might receive no benefits at all, at least if its present and probable use be taken into account. If that possibility does not invalidate the act, it would be surprising if the corresponding fact should invalidate an assessment. Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things. And this has been the implication of the cases."

This case last above cited is followed by the Supreme Court of the State of Washington in a case involving similar facts, the Washington Supreme Court supporting an assessment upon a railroad right of way for the construction of sidewalks.

Northern Pacific R. R. Co. v. Seattle, 46 Wash. 674.

In the case of *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, which is a case cited by counsel for appellant in his brief, the court in sustaining *ad valorem* assessments in an irrigation district under the Wright Act said:

"It is insisted that the basis of the assessment upon the lands benefited, for the cost of the construction of the works, is not in accordance with and in proportion to the benefits conferred by the improvement, and therefore there is a violation of the constitutional amendment referred to, and a taking of the property of the citizen without due process of law.

"Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation. Whatever objections may be urged to this kind of an assessment, as being in violation of the state constitution, yet, as the state court has held them to be without force, we follow its judgment in that case, and our attention must be directed to the question whether any violation of the federal constitution is shown in such an assessment. Can an ad valorem assessment on the land benefited, or, in other words, can such an assessment as is provided for in sections 18, 20, 21, and 22 of

the act, be legally levied in such a case as this? Assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received, and that no land ought, in justice, to be assessed for a greater sum than the benefits received by it; yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry. Some means of arriving at this amount must be used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made, and, where the fact of some benefit accruing to all the lands has been legally found, can it be that the adoption of an ad valorem method of assessing the lands is to be held a violation of the federal constitution? It seems to us clearly not. It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discretion of the state legislature, and with which this court ought to have nothing to do. The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem, and far from a case of taking property without due process of law.

"In the case of Davidson v. New Orleans, 96 U. S. 106, the assessment, with which this court refused to interfere, was for a local improvement (reclaiming swamp lands); and by section 8 of the act of the legislature of Louisiana, passed in 1858 (Laws La. 1858, p. 114), such a uniform assessment was levied upon 'the superficial or square foot of land situate within the draining section or district of such board' as would pay for the cost of construction. The effect of this provision was that each foot of land in the whole district paid the same sum as any other foot,

although the assessment was founded upon the theory of an assessment for benefits. It was complained that the amount assessed upon plaintiff's lands was excessive, and that part of them received no benefit at all, and it was to that argument that the reply was made that it was a matter of detail, so far as this court was concerned, i. e., it was not a constitutional question, and therefore was not reviewable here.

"In Walston v. Nevin, 128 U. S. 578, 9 Sup. Ct. 192, an assessment was laid upon lands for benefits received from construction of a local improvement, according to the number of square feet owned by the landowner. It was urged that it was not an assessment governed by the amount of benefits received, but was an absolutely arbitrary and illegal method of assessment. This court held the objection not well founded, and that the matter was for the decision of the legislature, to which body the discretion was committed of providing for payment of the improvement.

"We refer to the case of Cleveland v. Tripp, 13 R. I. 59, decided in 1880, as one which treats this subject with much ability. The act provided for the construction of a sewer in the city of Providence, and directed the laying of an assessment upon the abutting lands of a certain sum for each front foot, and another sum for each square foot extending back 150 feet. The claim was made that such a mode of assessment did not apply the tax in proportion to the benefits received, and was unequal and unfair, and therefore unconstitutional. The court, while admitting the complaint of inequality to be well founded, yet held the act to be within the power of the legislature.

"There are some states where assessments under such circumstances as here exist, and made upon an ad valorem basis, have been held invalid, as an infringement of some provision of the state constitution, or in violation of the act under which they were

levied. Counsel have cited several such in the briefs herein filed. We do not discover, and our attention has not been called to, any case in this court where such an assessment has been held to violate any provision of the federal constitution. If it do not, this court can grant no relief.

"The method of assessment here provided for may not be the best which could have been adopted in order to accomplish the most equal and exact justice which the nature of the case permits. But, none the less, we are unable to say that it runs counter to any provision of the federal constitution, and we must for that reason hold the objection here considered to be untenable."

IV.

VALIDITY OF ADDITIONAL ASSESSMENT TO MAKE UP DEFICIENCIES CAUSED BY DELINQUENCIES IN PAYMENT OF ASSESSMENTS

On page 72 of appellant's brief, under the heading "Analysis of the Opinion of the State Supreme Court in the Case on Appeal," counsel for appellant attacks that part of the opinion of the State Supreme Court holding that the unpaid delinquent assessments and lands acquired by the district under sale for unpaid assessments are assets of the district and create an added benefit to the district as a whole and to each landowner individually.

This doctrine was first announced by our Supreme Court in the case of *State ex rel. Wells v. Hartung*,

150 Wash. 590, in which decision the court said at page 601:

"Nor have the land owners any right to question the assessments on the theory that they have paid assessments equalling the total amount of their benefits. The lands passing into the ownership of the district are not to be considered as liabilities, but assets. It may be that, during periods of depression in the market value of such lands, such as have prevailed for some years, the lands do not appear to be assets. Their temporary exclusion from liability to pay assessments is anticipated by the provisions of the statutes we have quoted."

In the decision in this case now on appeal, this court, discussing this question, said:

"The benefits to the appellant's lands are not only the benefits accruing by reason of the improvements for the payment of which the district issued bonds in the amount of five hundred and thirty-eight thousand dollars. Lands acquired by the district for unpaid assessments are assets of the district. An added benefit therefrom accrues to the district as a whole and to each landowner individually. Such benefit is a basis, as are the unpaid assessments on other lands within the district, for the secondary liability to which reference is made in State ex rel. Wells v. Hartung, supra."

See printed Transcript of Record, p. 27.

The doctrine was laid down originally in the case of *Cosman v. Chestnut Valley Irrig. Dist.*, 74 Mont. 111, 238 Pac. 879, 40 A. L. R. 1344, in which decision, which involved an irrigation district assessment, the court said: (See pp. 1348 and 1349 of 40 A. L. R.)

"Plaintiff insists that if the faithful taxpayer must be assessed in amount sufficient to cover the delinquencies of his neighbors, his assessment will be so out of proportion to the benefits received as to constitute a violation of the principle above stated, and hence a taking of his property without due process of law and without just compensation. But plaintiff apparently loses sight of the fact that when lands are sold for delinquent assessments, the proceeds of the sale pass to the credit of the irrigation district. This money may be used in paying bonded indebtedness and thus reduces the plaintiff's next assessment. If the land is struck off to the county the irrigation district receives a debenture certificate showing the amount of its delinquent tax and its equitable interest in the land, legal title to which is in the county. Plaintiff thus is presumed to receive back in money, or in an interest of the irrigation district in the lands sold for delinquent taxes, approximately the amount which was added to his assessment to make up the delinquent taxes, and it cannot be said that his assessment is out of proportion to the benefits received. * * * *

"The faithful taxpayer will be presumed to receive some benefit from the added success of the district as a whole, which might otherwise be imperiled if the delinquencies were not met. Although referring to general taxes, we think the remarks of Chief Justice Dixon, in State ex rel. Soutter v. Madison, 15 Wis. 30, are pertinent here."

While it is true, as set forth on page 75 of appellant's brief, that after a change of the statute of Montana a different rule was laid down in the case of *State ex rel. Malott v. Board of Commissioners of Cascade County*, 89 Mont. 37, 296 Pac. 1, the supreme court of this state in its opinion in this case calls

attention to the fact that in the *Malott* case it was pointed out that the statute of Washingon was different from that of Montana, thereby distinguishing the decision of the Supreme Court of the State of Washington in *State ex rel. Wells v. Hartung.*

However, while we submit that the view of the Supreme Court of the State of Washington that an added benefit is created affording the basis for an assessment by the ownership of the district of delinquent assessments and lands acquired for sale for district assessments, it is not necessary to support a levy for deficiencies involved in this case upon that theory.

This court has supported an assessment for such a deficiency in a similar case and there are a large number of cases decided by this court and other Federal courts sustaining in principle such an assessment.

In *Orr v. Allen*, 245 Fed. 486, there was involved certain assessments under the Ohio Conservancy Act. Two objections were made, first to the levy of three-tenths of a mill on the lands of the district for preliminary expenses. As will appear by paragraph [12], p. 497, of the decision, this was supported and held valid under the rule of the case of *Houck v. Little River Dist.*, 239 U. S. 244, 36 Sup. Ct. 58.

The Ohio Conservancy Act further contained a provision providing for levies to pay the principal and interest of the bonds, and it was contended in that case that where a landowner had paid his entire assessment in full upon an appraisement of benefits to his property, he could, nevertheless, be assessed such additional amount as might be necessary to pay the principal and interest of the bonds. See 245 Fed. paragraph [14], p. 498. This case was appealed to this court and this court in affirming the decision of the lower court said:

"The appellant, a citizen of California, owning property within this district, filed his bill to enjoin the enforcement of the statute on the ground that it was repugnant to both the Constitution of the state and that of the United States. The court, organized under section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1916, §1243]), in a careful and clear opinion disposed adversely of every proposition upon which the contention was based. The injunction was refused. This direct appeal was taken.

"All the contentions rest upon one or the other or both of two propositions: (1) That the statute is unconstitutional because of some particular provision relied upon; and (2) because of the inherent want of constitutional authority by government to exert the powers which the statute gave. The first assumes that the statute has a significance which the Supreme Court of Ohio has expressly decided it has not, and, in addition, that the Constitution of the state forbids the exertion of a legislative power which the same court has expressly held the Legislature possessed.

The second disregards a line of conclusive decisions of this court which leave nothing open for controversy, or, which is tantamount thereto, separates expressions in opinions of this court from their context in order to give to them a meaning which the opinions do not sanction and which it has been repeatedly declared would be inconsistent with the decided cases.

"Thus concluding, we think nothing is required to dispose of the controversy but to cite the two lines of cases referred to. (1) Snyder v. Deeds, 91 Ohio St. 407, 110 N. E. 1068; Miami Co. v. Dayton et al., 92 Ohio St. 215, 110 N. E. 726; Com'rs v. Gates, 83 Ohio St. 20, 34, 93 N. E. 255; State ex rel. Franklin Co. Conservancy District v. Valentine, 94 Ohio St. 440, 114 N. E. 947; (2) Houck v. Little River District, 239 U. S. 254, 262, 36 Sup. Ct. 58, 60 L. Ed. 266, and cases cited."

Orr v. Allen, 248 U. S. 35, 39 Sup. Ct. 23.

In the case of *Norris v. Montezuma Valley Irr. Dist.*, 248 Fed. 369, in the Circuit Court of Appeals of the 8th Circuit, the court supported assessments on property of one landowner for deficiencies caused by failure to pay assessments on other land, and in doing so called attention to the fact that in all taxation there was more or less inequality caused by the failure of some to pay, and that such inequalities have never been held to be a violation of the constitutional provision against uniformity of taxation, quoting largely from the case of *State v. Common Council*, 15 Wis. 30.

This decision by the 8th Circuit was brought to this court on certiorari and the writ denied.

Norris v. Montezuma Valley Irr. Dist., 248 U. S. 559, 39 Sup. Ct. 10.

On pages 54 and 55 of appellant's brief it is contended that "the rights of an individual land owner in the District were not raised," counsel then quoting a part of what was said by the court on this question. Following the quotation made by counsel the court said: "Considering the defense as one that may be made by the defendants," and then proceeds to consider the question and decide it as we have stated above. The suit being one to compel action by the commissioners to levy the assessment for the deficiency, it is perfectly clear that the question was one involved in the case and necessarily decided.

The validity of provisions of an irrigation statute permitting the assessment of the property of one land owner who has paid for the deficiencies in the fund to pay the bonds caused by the failure of other land owners to pay has almost universally been supported in the state decisions.

Noble v. Yancy, 241 Pac. (Ore.) 335, 42 A. L. R. 1178.

Clancy v. Columbia Irr. Dist., 121 Wash. 86;

Kollock v. Barnard, 242 Pac. 847 (Ore.);

Stevens v. Melville, 175 Pac. 602 (Utah);

American Falls Reservoir Dist. v. Thrall, 228 Pac. 236 (Ida.);

Nelson v. Board of Commissioners of Davis County, 218 Pac. 952 (Utah).

The last case cited is cited by appellant at page 54 of appellant's brief as not contravening appellant's position. But it is clear that in the later Utah case (*Nelson v. Board of Commissioners*) the court clearly held that so far as the statute provided, deficiencies in collection of assessments could be assessed against the paying property, the court saying at page 954:

"It would therefore seem to be conclusive that a tax levied against property in an irrigation district is governed and controlled by the benefits received by each landowner and for that reason a landowner cannot and should not be penalized further than is provided in the act for his pro rata share of delinquencies of other property owners in failing to pay the taxes assessed against their property. The statute also seems to limit the power of the county commissioners to levy any greater amount for delinquencies than 15 per cent."

V.

THE MATTER OF INTEREST

As shown from the discussion in the early part of this brief, the assessments complained of were largely, if not wholly, made to provide for interest payments upon the bonds. We submit that no property owner can complain against assessments for the payment of interest. The benefits flowing to the land were a

present benefit at the time of the advancement of the money by the bondholders and the making of the improvements. The land owner instead of paying this had the use of the money until he paid the assessment, and even if the benefits flowing from the improvements were limited to the principal of the bonds it is not an unreasonable provision nor does it take property without due process of law to require the land owner to pay interest in addition to the principal, as he has in the meantime the advantage of the money. The use of the money, or rather, the extension of time within which to make the payment for the present benefit, is an added benefit.

But as a matter of fact as shown by the decision in the case of *State ex rel. Wells v. Hartung*, 150 Wash. 600, the adjudication as to the organization of the district made in 1918 determining the lands to be therein included and the amount of the bonds to be issued and the interest to be paid thereon, was a conclusive adjudication that the total benefits to the lands in the district equalled the amount of the bonds. The bonds provided not only for principal but for interest, with its rate and time of payment. The adjudication as to the amount of benefits therefore included both principal and interest.

And as heretofore shown in this brief, it was expressly admitted by appellant in his brief in the state court in this case that the aggregate benefits equalled the bonded debt. The bonded debt included interest as well as principal.

CONCLUSION

It is well known that irrigation in Western states is the means of transforming valueless deserts into fertile valuable farms. To speak of irrigation as benefitting lands in most irrigation districts hardly gives an accurate idea of the true situation. Substantially all the value is usually created by the irrigation. The value of the unirrigated acre is usually so negligible as to be hardly worthy of consideration. Hence arises the great public interest which is affected by the irrigation statutes.

To seek to require greater accuracy of the tax laws of a state in fixing or distributing benefits created by irrigation improvements than is required in ordinary municipal improvement statutes is to make it impossible to create the improvements or finance them. Under laws providing for front foot and ad valorem assessments much greater hardships and inequalities than are claimed here, have been, and rightly, supported by this court as being within the

power of the state. There is no complaint here that there is any discrimination or inequality between property owners. All are treated on the same basis. The complaint is as to detail of administration temporary in its character. Even if it were otherwise, the provision complained of providing for assessment for deficiencies is well within the power of the state under its tax power and not inimical to the 14th Amendment.

We respectfully submit:

1. That no federal question is involved and the appeal should be dismissed.

2. That if not dismissed, the judgment of the state court should be affirmed.

Respectfully submitted,

HAROLD PRESTON,
O. B. THORGRIMSON,
L. T. TURNER,
Attorneys for Appellees.

No. 516

FEB 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

J. T. ROBERTS, *Appellant*,

vs.

RICHLAND IRRIGATION DISTRICT, an Irrigation District; C. J. BARNETT, W. A. STOCKMAN and W. C. MCINNIS, Directors of the Richland Irrigation District, an Irrigation District, and HARRY FORSYTH, Treasurer of Benton County, Washington; B. J. PACIUS, IRA C. HAWLEY and H. S. HUGHES, County Commissioners of Benton County, Washington, *Defendants*,

J. T. S. LYLE, DIX ROWLAND, CHARLES HEATH, T. H. BOWDEN and H. E. DAVENPORT, individually and as Trustees, *Interveners, Appellees.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION FOR PERMISSION TO FILE BRIEF *and* BRIEF OF AMICI CURIAE

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THE ARGUS PRESS - SEATTLE

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As Amici Curiae.

special counsel to file the attached brief as *amici curiae*, in the interests of the State of Washington.

The Attorney General of the State of Washington has found it impossible to file a brief as *amicus curiae* in accordance with the permission heretofore granted by this Court.

The conditions specified for a brief by the Attorney General have been complied with and said brief is submitted in lieu thereof under the executive authority of the state.

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THE ARGUS PRESS - SEATTLE

INDEX

SUBJECT INDEX

	Page
STATEMENT	1
ARGUMENT	2
Summary of propositions which the argument will attempt to sustain	2
Question stated in opinion of State Court	3
Question as stated by appellant	3
Segregation of individual benefits not required by state statute	4
Discretionary powers of the state in tax matters	4
Statement of federal question involved	5
The challenge to the state statute is limited to those provisions relating to assessments	5
Specific determination of individual benefits for assessment purposes impracticable	6
Rules announced in the *Fallbrook* case applicable to case at bar	12
Congress has approved the principle underlying the apportionment of district assessments authorized by the Washington law for Federal Reclamation Projects	15
CONCLUSION	16

INDEX TO AUTHORITIES

CASES CITED

Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. ed. 369 ..... 2, 8, 11, 12, 13, 14, 15

Hagar v. Rec. District, 111 U. S. 701, 28 L. ed. 569 10

Houck v. Little River Drainage District, 239 U. S. 254, 36 Sup. Ct. 58, 60 L. ed. 266 4

La Mesa etc. District v. Halley (Cal.) 239 Pac. 719 8

Roberts v. Richland Irrigation District, 169 Wash. 156, 13 Pac. (2nd) 437 ..... 3, 5

INDEX TO AUTHORITIES (Continued)

STATUTES CITED

	Page
Remington's Revised Statutes of Washington (Ann.):	
Vol. 5, Title 16, Chapter 16	2
Section 7433	9
Section 7436	10
United States Reclamation Act (32 Stat. 390)	15
United States Code Annotated:	
Title 43, Section 423d	15

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF AMICI CURIAE

STATEMENT

The undersigned, special counsel for Erle J. Barnes, as Director of the Department of Conservation and Development of the State of Washington, with the approval and under the direction of the Governor of said state, most respectfully submit the following brief as *amici curiae* in the instant case.

The interest of this state in court decisions affecting

irrigation districts is substantial. The statutes of the state authorize the expenditure of public funds in support of irrigation development. Remington's Revised Statutes of Washington (Ann.) Vol. 5, Title 16, Chap. 16. In furtherance of the purposes of the statute, the State of Washington, through the Department of Conservation and Development of said state has purchased bonds of irrigation districts and is now the owner and holder thereof. The state, therefore, is concerned in the instant case not only by reason of the public interest therein but by reason of its proprietary rights indirectly involved in this litigation.

ARGUMENT

Summary of Propositions Which the Argument Will Attempt to Sustain

1. The state has full and exclusive authority to determine what form improvement districts shall take and what plan of taxation shall be employed for their costs.

2. So long as the state exercises these discretionary powers in a reasonable manner and in furtherance of the public objects sought, it does not violate any provision of the Federal Constitution, even though inequalities and unfairness so far as private individuals are concerned, may result.

3. Under the rule announced in the *Fallbrook* case, the plan of apportionment of assessments provided for in the Irrigation District Act of the State of Washington is reasonable and does not violate any provision of the Federal Constitution.

Question Stated in Opinion of State Court

The principal question in the case at bar is found in the opinion of the state court, *Roberts v. Richland Irrigation District*, 169 Wash. 156, 13 Pac. (2nd) 437, at page 159 of the state report, as follows:

> "Assuming the legal organization of an irrigation district after notice and hearing upon the question of organization, boundaries, inclusions of land to be benefited and the total amount of benefits to all the lands within the district, is the individual landowner entitled to another hearing after due notice for the purpose of allocating to his land its just proportion of the benefits, and does the benefit thus allocated limit his liability to pay?"

Question As Stated By Appellant

The appellant states the question at page 10 of his brief as follows:

> "Does the Irrigation District statute of the State of Washington (Appendix i.) trangress the Fourteenth Amendment to the Federal Constitution, in that, by its express terms, and by judicial construction thereof, and by its application, it takes property without due process of law by authorizing the levy of assessments by an irrigation district in substantial excess of the benefits to the lands assessed, solely for the purpose of paying for benefits conferred upon the lands of others in the district who have defaulted in their payments?"

Segregation of Individual Benefits Not Required By State Statute

The inquiry then is whether the provisions of the Constitution of the United States require a segregation of the total aggregate benefits received by the lands of the district as a whole on account of a bond issue, under the laws of the State of Washington, into individual shares and an apportionment thereof to each tract of land for assessment purposes. The statute of the state does not provide for such segregation. The alleged necessity for this segregation of individual benefits, it appears, arises out of the theory that since under the Federal Constitution no landowner can legally be assessed for the cost of improvements in excess of the benefits conferred by the construction of such improvements, the landowner is entitled to an individual determination of this question to protect himself against exactions in excess of such benefits to his land.

Discretionary Powers of the State in Tax Matters

Generally speaking, the state has full and exclusive authority to determine what form improvement districts shall take and what plan of taxation shall be employed for their costs. The form of district authorized may be imperfect relatively speaking. The plan of taxation provided may result in inequality and unfairness so far as individual landowners are concerned. Yet these are matters of state discretion and in such matters the state is supreme.

Houck v. Little River Drainage District, 239 U. S. 254, 36 Sup. Ct. 58, 60 L. ed. 266.

The state, however, has limited some of its sovereign powers and delegated them to the Federal Government. This limitation is expressed in the Federal Constitution. This constitutional limitation was never calculated to, nor does it legally speaking, interfere with the discretionary powers of the state so long as those powers are exercised in a reasonable manner.

Statement of Federal Question Involved

The federal question involved here then is whether the plan of district taxation provided by the statutes of the State of Washington is so arbitrary in its nature as to amount to an unreasonable exercise on the part of the state of its discretionary powers within the meaning of the Federal Constitution as construed by this Court.

The state court has sustained this legislation in the case at bar.

Roberts v. Richland Irrigation District, 169 Wash. 156, 13 Pac. (2nd) 437.

The Challenge to the State Statute Is Limited to Those Provisions Relating to Assessments

As heretofore pointed out, the only provisions of the state statute in question, involved in the issue, are those relating to the plan of assessment against the lands in the district. This issue is fully discussed in the briefs of the respective parties with citation of appropriate supporting authorities. We shall not attempt to repeat or consider these discussions here. Our endeavor will be to call to the attention of the Court some of the practical aspects, which, we believe, should

be fully considered by the Court in reaching conclusions on the issues involved. While it may be said that the peculiar conditions surrounding irrigation district operation do not change the principles of law which govern special assessment taxation, yet, it is upon these things that the success of district development depends, and it is only with a consideration of these practical aspects that any proper solution of the legal problems involved can be found.

Specific Determination of Individual Benefits for Assessment Purposes Impracticable

The implication of the appellant's contention on appeal is that our state statute is unreasonable and unfair in that it makes no provision for a specific determination of the individual benefits accruing to each tract of land for assessment purposes. It is assumed in this connection by the appellant that individual benefits all arise at one and the same time and can readily be ascertained. We have a different conception of such benefits. Under the corporate plan of district operation, a particular improvement in itself does not create the benefit conferred. The benefit arises from the water and its continued availability for irrigation. The improvement is merely part of the means by which the water is made available. The benefits arise out of the district operation by means of which a corporate group of farmers are able to furnish water which could not be feasibly secured by one individual farmer working alone.

The appellant appears to contend that such benefits, as to an individual tract of land, are to be measured

by the enhancement of its market value immediately after the construction of the improvement financed by the bond issue (Par. IX App. Complaint, Tr. 4). It may be said, therefore, under this contention that for practical purposes, the assessing officers of the district are authorized to determine in advance the ultimate benefits of individual tracts of land independent of and without regard to the total aggregate benefits arising out of the bond issue and accruing to the lands of the district as a whole. This authority apparently is to be bestowed by judicial decree in the absence of specific statutory provision and the same is to be exercised by the assessing officials of the district after the bonds have been sold and without the consent or approval of the bondholders concerned.

The contention that the benefits accruing to the several tracts of land in the district shall be segregated for assessment purposes and determined at the beginning of the use of the improvement financed by the issuance and sale of bonds, it appears to us entirely disregards the corporate nature and the continuing operation of an irrigation district. Such a rule, in our opinion, is not necessary to meet the constitutional requirements of the Irrigation District Law.

It may be admitted that exactions levied by irrigation districts are in the nature of special assessments constitutionally justified by benefits conferred upon the property assessed.

Such a district, however, is more than a local improvement subdivision of the county. It has a governing body of its own, its officers are public officers and

it exercises very broad powers, including those relating to indebtedness and taxation.

Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. ed. 369.

In short, an irrigation district is a quasi municipal corporation, and the rules of law applied to municipal corporations are generally applied to such districts.

La Mesa etc. Dist. v. Halley (Cal.) 239 Pac. 719.

In the case of the ordinary local impovement district in a city the lands included generally have a distinct value apart from the contemplated improvement. In the case of the irrigation district the arid lands have little or no value without water. It is the water that gives value to the lands. Not only is it the water, but it is the water kept available for irrigation from time to time and from season to season, that maintains these values. The benefits which such lands receive from the irrigation improvements can never be accurately determined in advance. They depend entirely upon the successful operation of the district.

Lands sometimes become damaged by seepage and alkali. In such instances, it is manifestly unfair that the "tax-burdened" landowner should be foreclosed by a determination of benefits immediately after certain irrigation improvements are constructed.

The cost of the improvement in the case of an irrigation district is rarely apportioned at one time and in one assessment roll. The construction work is seldom done as a whole at one time. The development is progressive and done by units or by temporary construction which is later replaced by permanent works.

An authorized bond issue may be sold by the board of directors of the district from time to time in such quantities as may be necessary and most advantageous to the district. Remington's Revised Statutes of Washington (Ann.) Sec. 7433.

The rule of enhanced market value determined immediately after the construction of the improvement, as contended for by the appellant, is impracticable, inaccurate and unfair when applied to an irrigation district. The rule for the determination of benefits applied in the case of the ordinary unincorporated improvement district is ill adapted to the requirements of the irrigation district.

It is because of these practical necessities inherent in irrigation district operation, that the district statute provides for a different method of apportionment of benefits more in consonance with the requirements of arid land development.

Irrigation district bonds are corporate obligations. They are not specific liens on the individual tracts of private lands within the district, as is the case with the ordinary non-corporate local improvement bonds. Irrigation district bonds under our law are paid by annual levy against the lands in the district and the annual levy constitutes the only specific lien against the several tracts of private lands in the district.

It follows, therefore, that the constitutional provisions applicable to the determination of benefits received by the lands within an irrigation district are and must be satisfied in a somewhat different manner from that applicable in the case of the ordinary local improvement district, in which latter case the entire

obligation of the bond is direct, specific and several against each tract of land within the district.

In the case of a corporate improvement district such as an irrigation district with authority to issue general corporate obligation bonds, the question of benefits is a corporate one involving all the lands in the district as a whole. The constitutional requirements are fulfilled if the statutory method of determining such benefits is reasonable and the benefits to the entire district are equal to or greater than the amount of the liability imposed. When these requirements have been fulfilled, the individual landowner cannot call into question the district's total benefits. His only concern is whether his share of the annual exactions in relation to his neighbor's share is in accordance with the statute.

It is conceded that the aggregate benefits to the lands in the district equal the bonded debt, and it is conceded that the appellant's land has been benefited to some extent, the only thing remaining to be determined then is what share in relation to the other landowners in the district shall the appellant pay annually on account of the bonded indebtedness. The constitutional requirements have been met if the statute provides a reasonable method of apportioning this burden among the landowners involved.

Hagar v. Rec. Dist., 111 U. S. 701, 28 L. ed. 569.

Section 7436 of Remington's Revised Statutes of Washington (Ann.) provides that district assessments shall be made each year in *proportion* to the

benefits accruing to the lands assessed. The secretary of the district in preparing the annual assessment roll is required to specify in the appropriate column the *ratio* of benefits or when deemed more practicable the per acre value or the amount of benefits for assessment purposes.

In other sections of the statute provision is made for equalization of the annual assessment after notice given in the usual manner.

Our statute relating to assessments is set out at pages VI-X of Appendix to appellant's brief. We shall not burden the Court with a repetition of these sections of the statute here.

In the *Fallbrook* case, *supra*, 164 U. S. 112, 41 L. ed. 369, 394, it is stated with reference to the mode of levying assessments on the *ad valorem* basis as provided in the Wright Act of California:

> "Thus the act provides for a hearing of the landowner both as to the question whether his land will be benefited by the proposed irrigation, and when that has been decided in favor of the benefit, then upon the question of the valuation and assessment of and upon his land included in the district * * *. Our conclusion is that the act as construed with reference to the objections considered under this head is unassailable."

The underlying principle of apportionment provided for in our district law is not different so far as constitutional questions are concerned from that in the Wright Act considered in the *Fallbrook* case. We believe that our statute relating to the levy, equaliza-

tion and apportionment of district assessments meets all the constitutional requirements.

Rules Announced In the Fallbrook Case Applicable to Case at Bar

The appellant at page 66 of his brief sets out the following question:

> "Does individual maximum benefit limit individual liability to pay on the part of a landowner subject to special assessment in an irrigation district?"

The appellant concludes that this question was not presented by the facts in the *Fallbrook* case nor was it specifically decided in the case.

So far as the federal question involved here is concerned, namely: the extent to which the Federal Constitution limits the discretionary powers of a state to enact laws relating to the reclamation of its arid lands and to the methods of raising revenues therefor, we believe the *Fallbrook* case is in point in the instant case.

The *Fallbrook* case announces certain fundamental principles which are applicable to the case at bar. While this Court has many times since reannounced the rules announced in the *Fallbrook* case, it may yet be regarded as the outstanding authority of this Court on the subject with which it deals.

The plaintiff in the *Fallbrook* case was an alien owner of land in an irrigation district in the State of California. Her land was assessed by the district. She failed to pay the assessment. Her land was sold to the district for non-payment of the assessment.

After the sale and before the issuance of deed conveying the land in question to the district, she instituted an action in the Federal Court of that district to restrain the execution and delivery of any deed to the district because of the alleged invalidity of the act under which the sale was held (41 L. ed. 371).

Among other grounds, the validity of the irrigation district act involved was assailed in this Court by the landowner concerned on the ground that under the California act "the assessments are not based upon or apportioned according to benefits. Property not benefited is assessed and the burdens of assessment are perpetual and not limited to benefits" (41 L. ed. 375).

In dealing with this point, Justice Peckham, speaking for this Court, observes (41 L. ed. 394):

> "It is insisted that the basis of the assessment upon the lands benefited, for the cost of the construction of the works, is not in accordance with and in proportion to the benefits conferred by the improvement, and therefore there is a violation of the constitutional amendment referred to, and a taking of the property of the citizen without due process of law. * * * Assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received, and that no land ought in justice to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a dem-

onstration in geometry. Some means of arriving at this amount must be used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made, and where the fact of some benefit accruing to all the lands has been legally found, can it be that the adoption of an ad valorem method of assessing the lands is to be held a violation of the Federal Constitution? It seems to us clearly not. It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discretion of the state legislature, and with which this court ought to have nothing to do. The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem and far from a case of taking property without due process of law."

While the *Fallbrook* case involved the validity of a statute authorizing the apportionment of district assessments on an ad valorem basis, yet the rule of law announced applies with equal force to assessments apportioned on the ratio of benefits as under the law of the State of Washington. The apportionment under either law is based on benefits conferred. If a state statute providing for apportionment on an ad valorem basis does not violate the Federal Constitution, then it may be said with equal reason that a state statute providing for apportionment on the ratio of benefits does not violate the Federal Constitution. The rights

of the individual landowner are not more jeopardized under the Washington plan than under the other. The two states have exercised their respective discretions with respect to these matters, and we submit that under the rule announced in the *Fallbrook* case, the discretion exercised by the State of Washington in providing for apportionment of assessments on the ratio of benefits must be considered reasonable and not in violation of the Federal Constitution.

CONGRESS HAS APPROVED THE PRINCIPLE UNDERLYING THE APPORTIONMENT OF DISTRICT ASSESSMENTS AUTHORIZED BY THE WASHINGTON LAW FOR FEDERAL RECLAMATION PROJECTS.

The State of Washington has within its boundaries a number of Federal Reclamation projects administered under the provisions of the Federal Reclamation Act passed by the Congress June 17, 1902 (32 Stat. 390.) Federal funds have been and are being expended in the construction of these projects. This development is a matter of great public interest to the people of the state. Section 45 of the Act of Congress approved May 25, 1926, 44 Stat. 648, 43 U. S. C. A. Sec. 423d authorizing the Secretary of the Interior to turn over the collection of water charges to water-users' associations or irrigation districts, among other things provides:

> "The Secretary of the Interior, as a condition precedent to the amendment of any existing water-right contract, shall require the execution of a contract by a water-users' association or irrigation district whereby such association or

irrigation district shall be required to pay to the United States, without regard to default in the payment of charges against any individual farm unit or tract of irrigable land, the entire charges against all productive lands remaining in the project * * *."

CONCLUSION

It is submitted, therefore, that the State of Washington, in the exercise of its discretionary powers in dealing with the development of its arid lands, has adopted in its Irrigation District Act a plan of apportionment of assessments to defray the costs of such development which is reasonable under the existing conditions, and that the plan adopted does not violate any provision of the Federal Constitution.

Respectfully submitted,

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Special Counsel for Erle J. Barnes as Director of the Department of Conservation and Development of the State of Washington,

As Amici Curiae.

FILE COPY

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

Petition of the Appellant for Rehearing

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INDEX

SUBJECT INDEX

		Page
I.	Petition for Re-hearing	1
II.	Reasons for Re-hearing	1-13
III.	Prayer	13
IV.	Certificate of Counsel	13

INDEX TO AUTHORITIES

CASES CITED

Board of Directors of the Middle Kittitas Irrigation District v. Peterson, 4 Wash. 147; 29 Pac. 995 ..... 4, 8, 9

Boyd et al. v. Cunningham et al., 164 Wash. 335; 2 Pac. (2d) 647 6

Columbia Irrigation District v. Benton County et al., 149 Wash. 234; 270 Pac. 813 ..... 2, 3, 11

Fallbrook Irrigation District v. Bradley, 164 Wash. 112; 17 Sup. Ct. 56; 41 L. Ed. 369 8

In re Riverside Irrigation District, 131 Wash. 532; 230 Pac. 649 2

Kadow et al. v. Paul et al., 274 U. S. 175; 71 L. Ed. 982; 47 Sup. Ct. 561 ..... 1, 5, 8

Louisville Gas Co. v. Coleman, 277 U. S. 32 10

Perkins & Co. v. Diking District No. 3 of Island County et al., 162 Wash. 227; 298 Pac. 462 6

Quaker City Company v. Commonwealth of Pennsylvania, 277 U. S. 389 10

St. Louis Cotton Compress Co. v. State of Arkansas, 260 U. S. 346 10

St. Louis Southwestern Railway Co. v. State of Arkansas, 235 U. S. 350 10

State ex rel. Clancy v. Columbia Irrigation District of Stevens County, 121 Wash. 79; 208 Pac. 27 ..... 2, 3, 4, 5, 9, 11

State ex rel. Wells v. Hartung et al., 150 Wash. 590; 274 Pac. 181 ..... 3, 4, 9, 11

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 516

J. T. ROBERTS, *Appellant*,

vs.

RICHLAND IRRIGATION DISTRICT, an Irrigation District; C. J. BARNETT, W. A. STOCKMAN, and W. C. McINNIS, Directors of the Richland Irrigation District, an Irrigation District, and HARRY FORSYTH, Treasurer of Benton County, Washington; B. J. PACIUS, IRA C. HAWLEY, and H. S. HUGHES, County Commissioners of Benton County, Washington, Defendants; J. T. S. LYLE, DIX ROWLAND, CHARLES HEATH, T. H. BOWDEN and H. E. DAVENPORT, individually and as Trustees, Intervenors, *Appellees.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

Petition of the Appellant for Rehearing

Comes now the above named appellant, J. T. Roberts, and presents this, his petition for a rehearing of the above entitled cause, and in support thereof respectfully shows:

I.

The opinion of this court declares the assessment in question to be a general tax. This holding is in conflict with the decisions of the State court construing the statute; in conflict with the holdings of this court in the case of *Kadow et al. v. Paul et al.*, 274 U. S. 175; in conflict with the express admissions of counsel for the appellees on oral argument; and in conflict with the generally accepted concepts of the Bench and Bar of the State of Washington, as evidenced by the decisions of that State. The decision goes beyond any contention made by counsel for the appellees, and only indirectly takes cognizance of the basic contention upon which the appellant rests his case.

II.

The Supreme Court of the State of Washington has never declared that the levy of an irrigation district is a general tax. The language of the cases cited in appellant's brief (pages 17 to 30 and 58 to 72) clearly establishes that such a tax is a special assessment for

a local improvement and specifically negatives the contention that it is a general tax.

In *Columbia Irrigation District v. Benton County et al.*, 149 Wash. 237, 238; 270 Pac. 813, 815, the court adopts and reaffirms the language used *In re Riverside Irrigation District*, 129 Wash. 627; 225 Pac. 636:

> " 'It is argued, however, in support of the view that these irrigation districts are municipal corporations in a larger sense than we have suggested, *that they possess general taxing power;* that is, power to levy taxes without regard to proportional benefits flowing to private property within the district, as well as taxation by local special assessments burdening property in proportion to benefits. Are we in error in assuming that this is not so?' " (Italics ours.)

and the further language in that opinion which gives a negative answer to the question propounded, thereby specifically holding that the tax is not a general tax, as assumed by this court in its opinion herein.

This declaration of the State court in *Columbia Irrigation District v. Benton County, et al., supra,* is made in the light of and with specific reference to the case of *State ex rel Clancy v. Columbia Irrigation District et al.*, 121 Wash. 79; 208 Pac. 27, which is therein cited and discussed, and which it was the evident intent of the State court to limit.

The only basis for this court's declaration that the tax questioned herein by appellant is a general one is found in certain equivocal expressions of the State court herein, which are based on language found in *State ex rel. Clancy v. Columbia Irrigation District, et al, supra,* and in *State ex rel. Wells v. Hartung et al.,* 150 Wash. 590; 274 Pac. 181, to the effect that the *bond obligation is a general one* and that an irrigation district exercises certain functions of a municipal corporation. It is affirmatively established by the decisions of the State court that such expressions were not intended to and did not reverse or modify the other State decisions above set out. In *Columbia Irrigation District v. Benton County, et al., supra,* it is said on page 238, in 149 Wash., and on page 815 in 270 Pac.:

> "In the cases of *Peters v. Union Gap Irrigation District,* 98 Wash. 412; 167 Pac. 1085, and *State ex rel. Clancy v. Columbia Irrigation District,* 121 Wash. 79; 208 Pac. 27, there is general language referring to irrigation districts as municipal corporations. In each of those cases the court was considering a function which is necessary to the existence of a municipal corporation in the strict and proper sense; in the one, the right to sue and be sued; and in the other, the right to make contracts. *It was only in relation to these two functions that it was said that irrigation districts were municipal corporations.* It would have been more accurate to have said that irrigation districts are agencies of the State

> created by the legislature for certain definite purposes and that they might be considered quasi-municipal corporations." (Italics ours.)

Thus this declaration of the State court that the tax is not a general tax was made upon the specific consideration of *State ex rel. Clancy v. Columbia Irrigation District, et al., supra.*

The decision of this Court herein that this tax is a general one is rested solely upon language derived from the opinion of the State court herein. The latter rests on *State ex rel. Wells v. Hartung et al., supra,* which in turn rests on *State ex rel. Clancy v. Columbia Irrigation District et al., supra.* But as shown, the case of *State ex rel. Clancy v. Columbia Irrigation District, et al., supra,* has been modified and limited by the State court.

That it was not the intent of the State court to reverse *Board of Directors of the Middle Kittitas Irrigation District v. Peterson,* 4 Wash. 147; 29 Pac. 995, and the cases following it which establish the nature of an irrigation district and that the tax levied by it is a special assessment, is evident from the fact that *Board of Directors of the Middle Kittitas Irrigation District v. Peterson, supra,* is cited by the court in *State ex rel. Wells v. Hartung, et al., supra,* as determinative of the constitutionality of the Act.

We respectfully submit that, if the declaration of this court that this tax is a general one rested upon the proposition that the State court has so construed the Act, consideration should be given to all of the decisions of the State court and not solely to equivocal expressions drawn from some of the decisions.

III.

The language used in *State ex rel. Clancy v. Columbia Irrigation District et al., supra,* was before this court in *Kadow et al. v. Paul et al., supra.* The former case had been declared by the State court to apply to drainage and dyking district law in exactly the same manner that it applied to an irrigation district. The statutory provisions construed in *Kadow et al. v. Paul et al., supra,* with reference to the language of *State ex rel. Clancy v. Columbia Irrigation District, et al., supra,* are almost verbatum with those presented in this case. The contention of the appellant was identical with that of the appellant herein. The only distinction between the two cases is the fact that there had been no application of the statute in that case. There has been an application in the instant case.

This court held that the levy was a special assessment limited to benefits, not a general tax. The State

court has so construed and applied its declaration in two subsequent cases:

Boyd et al. v. Cunningham et al., 164 Wash. 335; 2 Pac. (2d) 647.

Perkins & Co. v. Diking District No. 3 of Island County, 162 Wash. 227; 298 Pac. 462.

These decisions of the United States Supreme Court and the Supreme Court of the State of Washington, construing identical statutes of this State, are clearly pertinent but are not discussed or distinguished.

We respectfully submit that a determination of whether this tax is a special assessment or a general tax cannot be made without reference to these decisions of this court and our own State Supreme Court; and that the decisions, cited in this court's opinion herein, based upon facts arising in another State and dealing with municipal corporations whose functions and powers are defined by wholly different statutes, are persuasive only and should not be permitted to over-ride the repeated declarations of the Supreme Court of the State whose statute is being construed.

IV.

On oral argument before this court, counsel for appellees admitted that the constitutional basis for

this tax must rest on benefits. In fact throughout the pendency of this litigation, it has never been seriously contended by any party hereto that this was a general tax. The discussion on pages 17 to 30 and 58 to 72 in appellant's opening brief before this court is not controverted nor is the conclusion drawn therefrom denied. Furthermore, it would appear from a careful reading of appellees' brief filed in this court, as well as in the State Supreme Court, that counsel for the appellees assumed without discussion that the levy was a special assessment, only justified by and based on benefits.

V.

A reading of the several State decisions set forth and discussed on pages 17 to 35 and 58 to 72 of appellant's brief demonstrates a generally accepted concept of the courts and the Bar of this State that, under the uniformity provisions of the State constitution, the constitutionality of this Act can be sustained *only by establishing its levy as a special assessment.* To hold this tax a general tax is to utterly invalidate the Act, with consequent economic chaos, in solvent and insolvent districts alike. To sustain the contention of the appellant and establish the levy as a special assessment, on the other hand, will affirm the constitutionality of the Act in all respects and merely

require a limitation in the amount of individual assessments in the insolvent districts.

The Supreme Court of the State, in *Board of Directors of the Middle Kittitas Irrigation District v. Peterson, supra,* and this court in *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112; 17 Sup. Ct. 56, have declared that the constitutional problems affecting the operation of this Act are of such great public and economic importance as to justify a meticulous and painstaking examination of the contentions of the parties, and to require a reference of decisions made to a consideration of legal fundamentals.

We respectfully submit that, insofar as the opinion of this court in this case holds that this levy is a general tax, it is rested only upon the quoted declarations from a *single* opinion of the State court and, insofar as it is in obvious conflict with numerous other decisions of that court as well as the decision of this court in *Kadow et al. v. Paul et al., supra,* it will result in a confusion which will be costly to the public, to the landowner, the irrigation district, and the bondholder.

VI.

In all its history, the State court has never expressly referred to the levy of an irrigation district

as a general tax. In many cases it has referred to it as a special assessment and has used arguments and applied rules which could only be pertinent to the consideration of a special assessment. The language of the State court in *State ex rel. Clancy v. Columbia Irrigation District et al., supra, State ex rel. Wells v. Hartung, et al., supra,* and the instant case does not use the expression "general tax." If this court construes that language to be the equivalent of a declaration that the tax is a general tax, then we have merely a clean cut conflict between the decisions of the State court.

The brief of appellees (p. 22) acknowledges the existence of such a conflict but declines to explain it. Briefs of the appellant demonstrate the possible conflict and submit arguments, supported by carefully chosen citations, to the effect that those decisions which characterize and discuss the levy as a special assessment conform to the fundamental law of the land.

In these circumstances this court is at liberty to construe the statute and adopt those decisions of the State court which are constitutionally sound. In the instant case this will require a consideration of *Board of Directors of the Middle Kittitas Irrigation District v. Peterson, supra,* and the other State de-

cisions set forth on pages 17 to 35 of appellant's brief, to which no reference is made in this court's opinion herein.

Assuming that the language employed by the State court herein and in *State ex rel. Wells v. Hartung et al., supra, impliedly labels this levy as a general tax*, this court is not bound by the State court's designation and characterization of the tax, but is at full liberty to determine for itself the nature of the levy.

> *Louisville Gas Company v. Coleman*, 277 U. S. 32, 38;
>
> *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U. S. 389, 401.

St. Louis Cotton Compress Co. v. State of Arkansas, 260 U. S. 346, wherein it is said on page 348:

> "But this court, although bound by the construction that the Supreme Court may put upon the Statute, is not bound by the characterization of it, so far as that characterization may bear upon its constitutional effect."

St. Louis Southwestern Railway Co. v. State of Arkansas, 235 U. S. 350, wherein it is said on page 362:

> "Upon the mere question of construction we are of course concluded by the decision of the State court of last resort, but when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal constitution, the decision is not dependent upon the form

> in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the State court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State." (Citing many cases.)

This can be done only by a consideration of the powers and functions of the taxing district, as established by the Statute, and all pertinent decisions of the State court construing them. *State ex rel. Clancy v. Columbia Irrigation District, et al., supra, State ex rel. Wells v. Hartung et al., supra,* and the instant case do not attempt to declare what powers are possessed by an irrigation district. In *Columbia Irrigation District v. Benton County, et al.,* 149 Wash. 237, 238; 270 Pac. 813, 815, the Supreme Court expressly defines the language employed in *State ex rel. Clancy v. Columbia Irrigation District et al., supra,* and specifically states what powers of a municipal corporation an irrigation district possesses, namely, the right to sue and be sued, and the right to make contracts:

> "It was only in relation to these two functions that it was said that irrigation districts were municipal corporations."

No decision of the State Supreme Court has ever held or intimated that an irrigation district exercises any governmental functions. No decision of the Supreme Court of the United States or of the State has

ever held that the power of general taxation might be exercised by a municipal corporation exercising no governmental functions. No authority is cited by opposing counsel to sustain the proposition that a general tax might be levied by a corporation exercising no governmental function. Nowhere in appellees' briefs is it contended that an irrigation district does exercise a governmental function. The contention of appellant, that the exercise of a governmental function is absolutely essential to the power to levy a general tax, is unanswered in the briefs of appellees and unnoted in the opinions herein, yet it absolutely negatives the possibility that the tax in question is a general tax.

We submit that this case is clearly distinguishable from one in which a municipal corporation like the City of New York, admittedly exercising governmental functions, is involved, and that the cause should be determined by a critical analysis of the decisions of the State court which define the powers of a municipal corporation. The power to levy general taxes is inseparable from the exercise of governmental functions. The State court has declared that an irrigation district exercises no such governmental functions, and we respectfully request a reconsideration of the argument on this point.

VII.

We fully appreciate the fact that a petition for a rehearing in this court is justified only in the most extraordinary circumstances. We believe those circumstances are present. A question of vast public interest is involved. The decision of the court has gone far beyond the contention of the appellees, and an application thereof would result in widespread economic disaster in the irrigated districts in this State.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted and that the judgment of the Supreme Court of the State of Washington herein be, upon further consideration, reversed.

Respectfully submitted,

R. J. VENABLES,
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JAMES B. HOWE,
ALBERT OLSEN,
CHARLES H. FARRELL,
Attorneys for Appellant.

BERNARD GOODWIN,
Of Counsel.

CERTIFICATE OF COUNSEL

I, R. J. VENABLES, one of the counsel for the above named appellant, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

R. J. VENABLES,
Attorney for Appellant.

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CORRECTED COPY p. 1,

SUPREME COURT OF THE UNITED STATES.

No. 516.—October Term, 1932.

J. T. Roberts, Appellant,
vs.
Richland Irrigation District, et al., etc.

Appeal from the Supreme Court of the State of Washington.

[March 27, 1933.]

Mr. Justice McReynolds delivered the opinion of the Court.

Richland Irrigation District is a corporation organized under the laws of Washington; and appellant owns forty acres of agricultural land within its limits. In 1920 at an election duly held a majority of the votes cast (appellant objecting) authorized the Directors to issue and sell $538,000 of its interest bearing bonds. This was done and the proceeds were devoted to improvements for irrigation purposes as contemplated. Interest on the bonds was made payable semi-annually; the principal in annual installments commencing July 1, 1931.

For ten years the Directors assessed against separate tracts of land lying within the District, in proportion to estimated benefits received by each from the improvements, such sums as were necessary to pay accruing obligations. Prior to 1931 the appellant paid a total of $1,168.65 on account of assessments against his land. In January of that year the Directors threatened to make a further assessment of $757.53 to meet deficiencies resulting from failure of others to pay assessments against their lands.

It is now asserted that appellant's land was benefited no more than $350 by the improvements ($10 for each irrigable acre); that he has already paid far more than that sum, with interest; and that to require further contributions to discharge the obligation represented by the bonds would deprive him of property without due process of law and thus violate the XIV Amendment. By bill, filed January 12, 1931, in the ~~Supreme~~ Superior Court of Benton County, he sought an injunction forbidding the threatened action. The trial court sustained a demurrer. The Supreme Court affirmed the judgment; and in support of its action said—

"An irrigation district is a public corporation having some of the powers of a municipal corporation. The bond obligation is a general corporate obligation. The landowner is not entitled to a segregation of his share of the obligation at the time it is created, or at a later time. There is no provision in the irrigation act for a segregation at any time. The obligation is a general one and all lands within the district are subject to taxation for the payment of the entire obligation. *State ex rel. Clancy* v. *Columbia Irrigation District*, 121 Wash. 79, 208 Pac. 27; *State ex rel. Wells* v. *Hartung*, 150 Wash. 490, 274 Pac. 181.

"In 1919 there was a due adjudication of the organization of the district determining the lands to be included within the district, the amount of bonds to be issued and the interest to be paid thereon. It must be conclusively presumed, from that adjudication, as we said in *State ex rel. Wells* v. *Hartung*, *supra*, 'that the total benefits to the lands comprised in the district were then finally adjudicated. Each tract of land within the district then became generally liable for the payment of the bonds and interest.' . . . Under the statute (sec. 7434, Rem. Comp. Stat.) all lands within the district became and will remain subject to specific assessment, in proportion to benefits, until the obligation is paid. The statute provides that irrigation district bonds and interest thereon shall be paid by revenue derived from an annual assessment upon the real property of the district 'and all the real property in the district shall be and remain liable to be assessed for such payment until fully paid as hereinafter provided.' . . ."

Counsel for appellant admit that the Directors rightly assessed appellant's land so long as the total did not substantially exceed actual benefits received. They concede liability because of delinquencies within the limit of benefits; but they assert that the threatened assessment would create a substantially larger charge and therefore is not permissible. The sole question now presented, they submit, is this: To what extent has the Irrigation District the right to assess in order to provide for payment of delinquencies?

The Supreme Court of the State has declared that under her laws the obligation of the bonds is a general one; that "all lands within the District became and will remain subject to specific assessment, in proportion to benefits, until the obligation is paid."

And thus the only question for our consideration—the federal one—is whether the State had power to create such a corporation as that court has declared the Irrigation District to be and to authorize the questioned assessment.

The power of a State to create local improvement districts with authority to lay taxes according to value, acreage, front foot, or benefits is definitely recognized by this Court. Also that the action of such a district in apportioning the burden of taxation cannot be assailed under the XIV Amendment unless palpably arbitrary and a plain abuse. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 176. *Houck* v. *Little River Drainage Dist.*, 239 U. S. 254, 262; *Miller & Lux, Inc.*, v. *Sacramento & San Joaquin Drainage Dist.*, 256 U. S. 129; *Valley Farms Co.* v. *Westchester County*, 261 U. S. 155.

If to meet a general obligation an irrigation district, proceeding under authority granted by the State, should lay a tax distributed according to value, there hardly could be reasonable doubt of its validity under the XIV Amendment. *Fallbrook Irrigation District* v. *Bradley, supra; French* v. *Barber Asphalt Pav. Co.*, 181 U. S. 324; *Webster* v. *Fargo*, 181 U. S. 394. And in the present case we are unable to say that because the assessment was distributed in proportion to estimated benefits that an exaction exceeding such benefits would amount to spoliation and represent a plain abuse of power. A general tax distributed in proportion to benefits received is not indicative of arbitrary action.

The principle applied in *Norwood* v. *Baker*, 172 U. S. 269, and similar cases, has no application here. Appellant's land will be assessed to meet a general obligation of the corporation and the mere fact that the apportioned burden will exceed estimated benefits gives no color to the claim of confiscation. As pointed out in the cases cited, lands may be taxed to pay for local improvements although they receive no actual benefits. Never, as the Supreme Court of the State has said, was appellant entitled to the segregation of his share of the corporate obligation. The statute did not contemplate that assessments against any tract should be limited to payment of its increased value. A general obligation was created and every tract subjected thereto.

Affirmed.

Mr. Justice SUTHERLAND took no part in the consideration or decision of this case.